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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOUIS E. WOLFSON,

Petitioner-Appellant,

—VS.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Whether the Court of Appeals, by affirming the denial by the District Court, without an evidentiary hearing or oral argument, of a petition for a writ of error *coram nobis*, has deprived petitioner of his Fifth Amendment rights under the holding in *Brady* v. *Maryland*, 373 U.S. 83 (1963), and sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings, so egregious as to mandate the exercise of this Court's power of supervision.

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In the

Supreme Court of the United States

October Term, 1980

Louis E. Wolfson,

Petitioner-Appellant,

—vs.—

United States of Amerija,

Respondent-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nature of Petition

Petitioner prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Second Circuit.

Opinions Below

The opinions below have not been reported. The opinion of the Court of Appeals appears at 109a. The District Court opinion appears at 87a-107a.

Jurisdiction

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 USC §1254.

The judgment sought to be reviewed was dated and entered on July 25, 1980.

A timely petition for rehearing was denied on September 18, 1980.

Constitutional and Statutory Provisions

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

15 USC § 77e. Prohibitions relating to interstate commerce and the mails

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise;

Statement of the Case

Introductory

On September 19, 1966, Louis E. Wolfson, petitioner herein, and Elkin B. Gerbert were indicted by a grand jury in the Southern District of New York in connection with sales during the early 1960's of unregistered common stock of Continental Enterprises, Inc. (hereinafter the "Continental case"). Wolfson was convicted on September 29, 1967, after a 23 day trial. He was sentenced to a year in prison, to pay a fine of $100,000, and to pay the costs of prosecution. The conviction was affirmed on December 27, 1968, 405 F.2d 779, and *certiorari* denied, 394 U.S. 946 (1969).

A motion for a new trial on grounds of newly discovered evidence was made on October 9, 1968, while the appeal was *sub judice.* Judge Palmieri denied the motion. 297 F.Supp. 881 (1969). The Second Circuit affirmed. 413 F.2d 804 (1969).

Petitioner served his sentence and paid his fines as well as the costs of prosecution.

On May 16, 1975, he filed a petition for a writ of error *coram nobis* as to the Continental conviction. He addressed a request to Chief Judge Edelstein that the petition be assigned to any judge other than Judge Palmieri. Judge Edelstein denied the request and referred the petition to Judge Palmieri. Thereafter, on June 18, 1975, Wolfson moved under 28 U.S.C. §§144 and 455 for disqualification of Judge Palmieri. That motion was denied in a memorandum and order dated July 23, 1975. A motion for reconsideration was denied by memorandum dated September 16, 1975.

On July 26, 1976, the court denied the petition for *coram nobis* in all respects, having refused all motions for discovery and an evidentiary hearing. The Court of Appeals affirmed, 558 F.2d 59.

On November 10, 1977, Wolfson filed three motions in the District Court, seeking *inter alia*, a court order pursuant to Rule 6(e) of Fed. R. Crim. P. permitting disclosure of the minutes of an appearance before the Grand Jury by one of Wolfson's trial counsel, Joseph Glickstein, Esq. The court issued an order making the transcript available. After deciding these motions, which included one for recusal, notwithstanding the earlier suggestion of the Second Circuit (558 F.2d 59, 64) that Judge Palmieri should voluntarily recuse himself if there were any further proceedings in the Wolfson case, Judge Palmieri stated that he would ask that any future proceedings concerning Wolfson would be addressed to another judge of the District Court, said judge being Judge Lee P. Gagliardi.

On December 6, 1978, Wolfson filed a new petition for a writ of error *coram nobis* before Judge Gagliardi. This petition presented matters never addressed in any prior efforts to overturn Wolfson's conviction in the Continental case. On February 20, 1980, Judge Gagliardi denied the petition without a hearing (87a-107a).

On July 25, 1980 the Court of Appeals affirmed in a brief opinion from the bench (109a). A petition for a rehearing, with a suggestion for hearing *en banc*, was denied on September 18, 1980 (111a).

The Petition

This petition is the culmination of Wolfson's thirteen year quest for justice and an opportunity to establish his innocence before a fair and impartial forum. The record

presents important new evidence in support of Wolfson's claim that has never been considered prior to submission before Judge Gagliardi. This evidence establishes specific, egregious violations of Wolfson's constitutional rights and supports Wolfson's assertion that he is innocent and that the conduct of the prosecution was anathema to the most fundamental tenets of law.*

More particularly, the second petition was filed in 1978 in view of the fact that new evidence had come to light subsequent to the submission of petitioner's prior *coram nobis* petition submitted on May 16, 1975. Such new information came to light as a direct result of disclosures made to petitioner pursuant to the Freedom of Information Act of 1975 ("FOIA"). Petitioner was not in a position to procure such information, pursuant to the FOIA, prior to July 1975 and, therefore, was in no position to utilize such information in his first *coram nobis* petition.

The new facts discovered pursuant to and as a direct result of the disclosures made to petitioner pursuant to the FOIA are as follows:

(a) that the testimony of John Morley, the prosecution's chief witness at the Continental trial, was tainted by blatant perjury which enabled the prosecutor to create the impression in the minds of the jurors that Morley was honest, forthright, and worthy of belief;

(b) that contrary to the unmistakable impression conveyed to the Continental jury by the prosecutor, petitioner was *never* a target of a Section 5 registration investigation in 1950 and, in fact, the subject investigation was a "manipulation" investigation (con-

* Considerations of space preclude a full presentation of this evidence in this petition. The Memorandum in support of the petition to the District Court is accordingly set forth in the Appendix hereto (9a-86a).

cerned with persons *other* than petitioner) not a "registration" investigation; and

(c) that, in point of fact, as is revealed in the deposition testimony of Anthony Englese, taken on September 10, 1976, the Government made a deal with John Morley and his employer (Reynolds & Company) that the Government would not prosecute Morley and/or his employer for violation of the Section 5 registration requirements if Morley would assist the Government in prosecuting Wolfson.

The disclosure of new information pursuant to the FOIA, and the above noted inevitable conclusions that must be drawn from this new information (which conclusions could not have been either formulated or corroborated until *after* petitioner's prior *coram nobis* petition) clearly established petitioner's right to relief.

In addition, petitioner's right to relief was further underlined by the following facts and circumstances which also came to light subsequent to the submission of petitioner's prior *coram nobis* petition:

Petitioner's recognition (after analysis of the subject FOIA disclosures) that the prosecutor at the Continental trial engaged in wilfull and deliberate prosecutorial misconduct in failing to disclose at the time of trial to petitioner and his attorneys the exculpatory information which petitioner did not procure prior to disclosure pursuant to the FOIA. Thus, as is established more fully hereinafter, the prosecutor misrepresented to the court at the Continental trial that certain pages of Morley's 1965 deposition testimony should be excised and not presented to the defense because said pages related to another case (the Merritt-Chap-

man case): when, in fact, the prosecutor knew full well that the subject excised pages constituted critical exculpatory material which would inevitably have led petitioner to the exculpatory documents which he did not find prior to the FOIA disclosures. In addition, the prosecutor withheld certain documents which clearly demonstrated that he wilfully deceived the jury into believing that petitioner, at the time of the Continental trial, had *already* been the *target* of a prior Section 5 registration investigation.

The District Court, however, denied the second *coram nobis* petition without argument or hearing. The language of the opinion parallels Judge Palmieri's prior findings by express quotation (Gagliardi decision, 96a), and by clear implication, all the way through the opinion and in the notes appended thereto. In sum, the lower Court merely rubber-stamped the prior findings of Judge Palmieri, giving short shrift to petitioner's new evidence which was never presented to Judge Palmieri.

The District Court was faced with the following allegations adduced against petitioner at trial:

(a) John Morley testified that he informed petitioner (through Gerbert) about the necessity of filing a registration statement prior to selling blocks of "controlled" stock;

(b) John Morley testified that he and his firm were conscientious in carefully observing the registration requirements. Thus, Judge Palmieri charged the trial jury as follows: (1) depending upon whether the jury believes "Morley on the one hand . . . or Wolfson on the other . . . will take [the jury] a considerable way on the road . . ." in arriving at a verdict; and (2) "If Mr. Morley's firm consistently and without explana-

tion violated the one per cent rule, then there would be little ground for believing him"; and

(c) The only remaining damaging allegation against Wolfson was brought out in connection with a 17 year old memorandum of an informal conference (with no attorneys present) between Wolfson and the SEC in 1950. The author of the subject memorandum (a man named Kelley) was dead at the time of trial. An SEC staffer present for part of the meeting got it in evidence even though he remembered nothing said at the meeting. At one point in the two hour meeting, there was a discussion of the technicalities in the sale of control stock. This was seized upon by the prosecution to use in final rebuttal and argue to the jury about "the nerve" of Wolfson in trying to fool the jury in 1967 the way he had fooled the SEC in 1950—17 years before. The clear implication of the prosecutor's argument was that petitioner had been under the gun as a target of a registration investigation in 1950 and had talked the SEC out of it the same way in which he was now trying to talk the jury out of it.

Now, take what developed after the trial step by step until the filing of the instant petition. The year after the trial, it was discovered that when the prosecution persuaded the Court to excise certain 3500 material on Morley, it was by the false statement that the excised material dealt with another case—Merritt-Chapman. The truth as developed is that it involved this very case, and not a mention of Merritt-Chapman. It pointed the way to fabrications on the witness stand by Morley in his denial of his violations of the rule in question. And it referred to a memorandum circulated by the SEC to employees of Morley's firm—A.M. Kidder. But there was not enough

at that juncture to tie the Kidder memorandum in with the 1950 Kelley memorandum used so devastatingly against Wolfson. The gaps were further filed in after 1975 and the passage of the FOIA. After the filing of the first *coram nobis* petition in 1975, the FOIA documents disclosed the following: Morley had been a persistent violator of the one per cent rule, and had lied to the jury. Of key significance, the 17 year old 1950 SEC meeting at which Wolfson had "the nerve" to fool them on the same issue Wolfson was trying to fool the jury never occurred in the context presented to the jury.

When the investigation order was timely produced, it showed that Wolfson was not even named as a subject of the investigation, was not being investigated on this or any other charge and would have had no motive or occasion to have "the nerve" to fool the SEC. It also showed affirmatively that as a result of the probe, Morley and his employer, Kidder, were forced to circulate a memorandum ("Kidder Memorandum") about their responsibility to the SEC and to their own customers.

If a good jury lawyer could not have prevailed on these facts, then the assessment of the inadequacy of legal talent by the Chief Justice is all too true.

As if this were not enough, late in the next year following the 1975 petition, Anthony Englese, the enforcement attorney through whom Morley cleared "control sales" while employed at Kidder and then Reynolds when it took over Kidder, gave a key deposition in another but related case. He admitted Morley had been "inaccurate" with the SEC; that Morley had no personal counsel when testifying before the SEC in 1965 (the vital testimony of which the prosecution excised part on false pretenses). In fact, Englese admitted that without disclosing he was

the enforcement man for Kidder-Reynolds, he gained access to the SEC hearing under the subterfuge of posing as Morley's "personal counsel", which he was not.

It also becomes clear that the deal cut with Morley, with his employer's lawyer Englese at his side, was that neither the brokerage firm nor Morley would undergo even as little as an administrative censure from the SEC in return for Morley's testimony against Wolfson.

The above facts, if known at trial, would have permitted petitioner's counsel to destroy Morley's credibility and expose his motives; they would have placed in proper perspective the underlying subject matter of the *Kelley* memorandum; they would have shown that there was no probe of petitioner at all in 1950, but that Morley's firm and others were the target. In other words, petitioner's attorney could have totally obliterated the crushing prosecution argument that petitioner had previously pulled the same innocence-act in 1950 before the SEC which he again pulled 17 years later at his own criminal trial.

In addition, the prosecution convinced the jury that petitioner must have been covering up and concealing his guilt when he purportedly failed to remember the 1950 SEC investigation—since he was a target and barely escaped prosecution. This argument would never have worked had the jury been apprised that the subject 1950 investigation was not aimed at petitioner and did not almost result in his prosecution. The District Court's speculation that petitioner *still* should have remembered talking informally without counsel at the SEC 17 years before trial is clearly unwarranted.

The New Facts

The new evidence which came to light *subsequent to* May 16, 1975 (the date on which Wolfson submitted his first *coram nobis* petition) includes, *inter alia*, the following:

(a) SEC documents and files relating to the 1950 Capital investigation;

(b) a memorandum, dated November 3, 1950, prepared by A.M. Kidder ("Kidder Memorandum");

(c) documents establishing that John Morley violated the one percent rule in selling Continental control shares in 1961;

(d) documents establishing that John Morley violated the one percent rule in selling control stock of Universal Marion in 1961;

(e) in addition, there is additional new evidence discovered subsequent to the 1967 Continental trial, but prior to May, 1975, the crucial significance of which could not be appreciated prior to receipt of the July, 1975 FOIA disclosures, to wit: the facts presented at pages 87-93 of the 1965 SEC testimony of John Morley which pages had been excised at the Continental trial by reason of prosecutorial misconduct.

The relevance and exculpatory nature of the above-noted evidence is plain.

A basic issue in the Continental trial was whether Wolfson *knew* of the existence of the requirement that he, as a control person, file a registration statement.

The argument of the prosecutor in his opening, the evidence he sought to elicit during his direct and rebuttal case as well as his cross-examination of Wolfson, his sum-

mation and finally Judge Palmieri's charge to the jury emphasized that the question of Wolfson's knowledge was the key issue contested throughout the trial.

Thus, in charging the jury, Judge Palmieri stated:

> "The fourth element which you must consider, and which presents a seriously contested issue in this case, is this: does the evidence establish beyond a reasonable doubt that each defendant knew that the offer, delivery or sale of Continental Enterprises, Inc. stock required, under the law, the filing of a registration statement . . ."

While the Continental trial dealt with the sale of millions of dollars of stock over a number of years by various persons in the "Wolfson group" handled by a number of stock brokers, the observation of the prosecutor in his opening was indeed accurate.

> ". . . (I)t is a simple case . . ."
>
> ". . . (T)hat is exactly what the defendants did . . . they violated this basic law of the securities industry by wilfully and knowingly selling . . . their stock . . . to the public without filing the required registration statement."

This element of knowledge was again highlighted by the prosecutor as the key issue to Wolfson's conviction in his summation.

The key witness against Wolfson who testified that he had conveyed to Wolfson the subject registration requirements was John Morley. Morley's testimony was of great significance in two aspects— the presentation of Morley (and A.M. Kidder) as being scrupulously *honest* in the handling of Wolfson control stock and concomitant there-

with Morley's *imparting of knowledge to Wolfson* (in actuality, after 1958 Wolfson through Gerbert) that sale of control stock was regulated by Section 5 of the SEC Act of 1933:

> "Q. (by the prosecutor) Directing your attention to the *entire period of your association with Mr. Wolfson and his associates* . . . did you follow a procedure in placing sell orders in the Wolfson accounts?"
>
> "A. Whenever any sell orders were entered in any of the companies that A.M. Kidder considered control companies of Wolfson, and they entered a sell order, I had to make inquiry as to whether stock had been sold in the previous six months and, before accepting the order, I had to tell them that I would call them back.
>
> I had to check with our New York office to see if the order was acceptable under the SEC regulations."

It was the import of Morley's testimony that on any occasion he received a sell order on a "Wolfson controlled company" he discussed "with the defendants" the particular SEC regulations that would apply.

Thus, the essence of the Continental trial came down to a credibility contest between Morley and Wolfson.

Thus, after noting "how scrupulous A.M. Kidder (Morley) was", the prosecutor continued on summation to emphasize that in deciding Wolfson's guilt, it was only a matter of weighing Wolfson's credibility against that of Morley.

> He (Morley) had a course of conduct and he testified at length . . . If you don't believe that John Morley is an arrant liar you have got to convict these defendants.

Thus, in deciding whether Morley had indeed imparted knowledge of Section 5 requirements to Wolfson it was solely a question of credibility: Morley versus Wolfson.

In fact, as noted *supra,* Judge Palmieri charged the jury "that Morley is a very important witness" (Tr. 2556) and that depending upon whether the jury believes "Morley on the one hand . . . or Wolfson on the other . . . will take (the jury) a considerable way on the road . . ." (Tr. 2556) in arriving at a verdict. In evaluating Morley's credibility, Judge Palmieri further charged the jury that:

> *If Mr. Morley's firm consistently and without explanation violated the one per cent rule, then there would be little ground for believing him.*" (Emphasis added.)*

According to Judge Gagliardi's opinion (a): "the Government called Morley as a witness at the trial to testify regarding procedures he and his firm followed in handling transactions for (Wolfson) and his associates, Morley stated that he and his firm were very conscientious about adhering to the Securities Act's restrictions on sales by control persons, that the firm rejected those sales that would violate the prohibitions and explained the restrictions to (Wolfson) and his affiliates."

While necessity mandates that the suppressed exculpatory material be set forth and discussed seriately, the final and full measure of such suppression lies in its subtly chilling cumulative effect that crept into the Wolfson court-

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* See discussion of "the Kidder memorandum" that follows showing that access to this memo by defense counsel at Wolfson's trial would have established that Morley had no explanation for his admitted violations, that the explanations Morley gave at trial were perjurious and that there was no "ground for believing him."

room enshrouding justice and allowing Wolfson's unjust conviction.

The exculpatory material deliberately suppressed by the prosecution in order to prevent disclosure of Morley's perjurious testimony and which shows him indeed to be "an arrant liar" consists of (1) the excised pages of Morley's 1965 SEC testimony (87-93); (2) "the Kidder memorandum" and (3) documents obtained from SEC file W525 relating to an SEC investigation of Capital Transit and Morley (A.M. Kidder) and SEC file W557.

Excised pages 87-89 of Morley's 1965 SEC testimony (taken under oath) contain a salient exchange (33a-35a).

Those excised pages of Morley's 1965 SEC testimony clearly demonstrate that the "scrupulously honest" John Morley and A.M. Kidder had been involved in an SEC investigation concerning unregistered sales of Wolfson control stock† going back to 1950, and that at the time of Morley's testimony in 1965 (only two years before the Continental trial) after denying under oath unregistered sales in Wolfson accounts violative of the one per cent rule that were the subject of the SEC inquiry in 1950, Morley, upon being shown Kidder documents, suddenly recalled the improper sales which he then sought to minimize as excusable.

Of most importance in reflecting on the truthfulness of Morley's trial testimony wherein he provided various excuses for sales of Wolfson control stock in the mid 50's that "somehow" exceeded the 1% rule and stated that it was not until after 1954, 1955 that more attention was paid to Wolfson's sales of control stock in Continental (Tr. 499, 567), is Morley's statement under oath before the SEC in 1965 that, *as early as 1950*, Morley began to watch *anything*

† The investigation was not aimed at Louis Wolfson, who made no sales (see *infra*).

Wolfson did "*very, very carefully*" since he was becoming a "*controller of corporations*".

The Kidder memorandum which the prosecutor deliberately suppressed and knowledge of which was hidden from defense awareness within the excised pages of Morley's 1965 SEC testimony (87-93) clearly shows that Morley committed perjury in Wolfson's 1967 trial. Before substantiating this assertion by a review of the circumstances that gave rise to the authorship of the Kidder memorandum in 1950, its explicit directions to Morley on the subject of control stock and the practice required to be followed in handling sales thereof, and a juxtaposition of the Kidder memorandum directives to Morley's perjurious "explanations" at Wolfson's 1967 trial of his understanding what constituted control stock, his obligations in making controlled stock sales and his "explanations" of the "innocent" errors he made in regard to certain sales that exceeded the 1% rule,* it is necessary to assess Judge Gagliardi's curtailed review of the Kidder memorandum that allowed him, in denying Wolfson's petition for a writ of error *coram nobis*, to state that "(t)his court cannot conceive of any possible theory under which (Wolfson's) possession of that document at trial would have caused a different result." (103a)

According to Judge Gagliardi "(p)etitioner argues that the memorandum would have been evidence that Morley knew of and later defied the Securities Act requirements, and also that the SEC had investigated Kidder." (*ibid.*)

Judge Gagliardi continued that "even if Morley and Kidder had violated the Securities Act in 1950, that fact could not have so discredited Morley in 1967 so as to have

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* It is beyond contradiction that such violations *did* occur in connection with sale of "Wolfson control stock" in Capital Transit in 1950 (*NOT* including Louis Wolfson).

affected the outcome of the trial". The *mere* fact of such violations were *NOT* alleged by petitioner-appellant as a basis for the writ before Judge Gagliardi nor is it now claimed as a ground for the instant petition. Finally, Judge Gagliardi's observation that "Morley's credibility had (already) been attacked at trial by the demonstration of inconsistencies between his SEC and trial testimony" (*ibid.*) has no relevance to petitioner's claim since those inconsistencies *do not rise to the level of perjury herein alleged.* Since there was no documentation available to defense counsel at Wolfson's trial to confront Morley as a result of deliberate prosecutorial suppression of exculpatory evidence such as "the Kidder memorandum" and SEC file W525, defense counsel was extremely circumscribed in his ability to cross-examine Morley successfully.

Availability of the Kidder memorandum now shows that Morley repeatedly committed perjury (with the prosecutor's knowing assistance) in his trial testimony in representing himself as one who assiduously endeavored to abide by the 1% rule in handling of Wolfson control stock. Once again, it must be emphasized that this is *not* a claim by petitioner-appellant that the Kidder memorandum is important merely as "evidence of Morley's knowledge and subsequent blatant disregard of the Securities Act requirements" (Gagliardi at 98a), but rather that Morley's answers to critical questions at Wolfson's trial in 1967 explaining his sales of Wolfson control stock in violation of the 1% rule as excusable are shown to be patently false when viewed in the context of Morley's awareness of the contents of the memorandum which was issued by Kidder as the direct result of Morley's sales of Wolfson control stock in 1950 in violation of Section 5 requirements.*

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* *Not* including Louis Wolfson.

Morley testified:

"A. I believed it, our New York office accepted it; and it was later, when control was established, and our lawyers looked into these sales, it was later on that they put Continental into the control group."

Likewise, Morley's definition of "due diligence" as *not requiring inquiry of a control person whether he had sold through other brokers* was fraudulent:

"Q. Didn't you ask him (Louis Wolfson) whether he sold it through other brokers?

"A. No, sir."

• • •

"A. That was due diligence if I asked him if he had not sold with us, *we could not police his actions in other brokers.*"

• • •

"Q. You didn't check whether any other members of the control group were also selling at the time?"

"A. That would not be necessary."

• • •

"Q. Didn't you assume the possibility that he (Gerbert in 1961) might have sold stock through some other broker?"

"A. No, sir."

"Q. Why not?"

"A. *A broker is not required when accepting an order from a customer to ask him if he sold stock through another broker.*"

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* This is clearly not the standard set forth in the Kidder memorandum, *supra*, and is in direct contravention to the requirements set forth in the memo as to who is a "control" person and how such sales should be handled.

"Q. You mean that wasn't part of your check, right?"
"A. That's right. You don't have to ask, 'Did you sell anywhere else?'" (Tr. 522, 523).*

In the petition, Wolfson has presented new evidence which establishes that the 1950 SEC meeting with Wolfson which the prosecution characterized as a successful attempt by Wolfson to induce the SEC not to prosecute him for violation of the registration requirements was in fact no such thing; Wolfson was neither a target of said investigation nor was under the gun; in fact, the subject investigation did not even relate to the Section 5 requirements but rather related to alleged manipulations of stock prices.**

Of equal consequence to the defense in the Continental trial was the prosecutor's deliberate nondisclosure of critical exculpatory documents contained in SEC files designated W525 (the 1950 investigation of Capital Transit from which the Government extracted the Kelly memorandum*** and which also served as the Government's hiding place for the Kidder memorandum and W557 (a 1952 investigation of Capital Transit). Disclosure of these SEC files for the first time under the Freedom of Information Act in 1975 now affords proof that the prosecutor, knowing that the defense lacked the key exculpatory information contained in these SEC files, made full use of his constitutionally impermissible advantage to attack Wolfson's credibility on cross-examination by falsely creating the appearance that

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* See explicit requirements in Kidder memorandum that show all of these answers by Morley to be blatant perjury and violative of his express obligations.

** In fact, the record establishes that petitioner was not even named as a subject of the 1950 investigation, and had sold no shares in connection therewith.

*** These matters are set forth at length in the Memorandum which accompanied the petition to the District Court (a).

Wolfson was the subject of a 1950 SEC investigation resulting from his sales of control stock in Capital Transit in violation of Section 5 which sales allegedly led to Wolfson's asking for and obtaining a meeting with Kelly, the Regional Director of the SEC and that Wolfson's inability to recall such an important meeting in the context of a trial for the same Section 5 violations made Wolfson's entire testimony unworthy of belief.

ARGUMENT

Introduction

Petitioner contends that the Court of Appeals by affirming the denial by the District Court after 11½ months, without an evidentiary hearing or oral argument—both repeatedly requested—of his petition for a writ of error *coram nobis*, has deprived petitioner of his Fifth Amendment rights under the holding in *Brady* v. *Maryland*, 373 U.S. 83 (1963), and sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings, so egregious as to mandate the exercise of this Court's power of supervision.

Initially, a threshold question that might be asked is the reason why petitioner persists in establishing his innocence of a charge pursuant to which punishment was imposed and completed 10 years ago. This persistence may seem all the more unusual in view of petitioner's high standing in the worlds of business and philanthropy for decades, and his recent unanimous acclaim in the world of sports and sportsmanship as the owner and developer of "Affirmed", the world renowned triple crown winner.

The answer to this question is that petitioner possesses a profound sense of honor and reputation and an unswerving belief in the injustice of his conviction, which injustice is now apparent and capable of proof to a point of certitude.

Further, we observe that the prosecution of petitioner was and is the only one of a kind. It is the only prosecution on record for a simple failure to file a registration statement without more. On the question of the selectivity of Wolfson's prosecution, we reassert that there is no single case in the 45 year history of the SEC comparable to this one. In no other instance, before or after *Continental,* has a technical, non-fraudulent violation of section 5 and rule 154 (sales by controlling persons of over-the-counter stock) in unsolicited brokerage transactions resulted in criminal indictment. That there was no fraud charged or proven in the instant case is made clear in the prosecutor's opening statement to the jury and Judge Palmieri's charge to the jury to the same effect.

Petitioner's prosecution is *sui generis* in yet another regard. In the memories of petitioner's attorneys, government counsel and Judges Feinberg, Lumbard and Coffrin, at least in the Second Circuit, no Judge, other than Judge Palmieri, ever held on to every proceeding involving a defendant for 10 years, including two successive trials (one reversed on appeal) and several hearings, all litigated in an atmosphere of increasing personal hostility between Judge Palmieri and petitioner.

In view of this, the Court of Appeals, although deciding not to order a recusal of Judge Palmieri in 1977, wrote in perfectly understandable English, that in the event of any proceedings subsequent to the first *coram nobis* petition, Judge Palmieri should recuse himself (558 F.2d 59, 64, footnote 17). The court even troubled to point out the change in the "must sit" rule to sooth Judge Palmieri and demonstrate to him that a recusal would not constitute an admission of bias. Nonetheless, instead of taking the olive branch, when the instant *coram nobis* petition was filed and assigned to Judge Palmieri by then-acting Chief Judge

Edelstein (over objection), Judge Palmieri not only refused to recuse himself, but launched a diatribe against the court that, again, is almost without precedent. Judge Palmieri made the following charges:

> (a) that the court was wreaking havoc with the "efficient administration of justice" by its failure to understand the impact of changing judges in mid-generation;
>
> (b) that the court misrepresented the record and the facts surrounding Judge Palmieri's having sentenced Wolfson the day before his desperately ill wife died—when the court had in fact once again attempted to explain and excuse Judge Palmieri's conduct; and
>
> (c) that the court went outside the record, thereby violating its own rules and placed "in its recitation of the facts . . .". Judge Palmieri in a posture where he could "only express [his] dismay . . .".

Having made said charges, Judge Palmieri then declared his autonomy from the Court of Appeals, denied the motion to recuse, and proceeded to decide two more motions (one against petitioner and the other in his favor after peeking at the material disclosure of which was requested and determining that it could not help petitioner). Only then did Judge Palmieri "voluntarily" reassign the balance of the case to Judge Gagliardi.

Judge Gagliardi held the matter for a year and then did nothing but parrot Judge Palmieri's prior findings, including a lengthy footnote quoting Judge Palmieri's attack on the court below (96a).

Judge Gagliardi, faced with substantial exculpatory material never before presented to any court, summarily disposed of it, not only denying a hearing but, in addition, refusing petitioner's numerous pleas for oral argument.

This petition is compelled by the fact that the Court of Appeals, in its July 25, 1980 decision from the bench, failed to address the merits of the subject petition and indeed, the court stated:

> "Judge Palmieri's bias and the Prosecutor's misconduct have already been rejected by this Court. They are again rejected. This Court finds the attack upon Judge Gagliardi without foundation. We find Judge Gagliardi's opinion to be fair and well reasoned and sound. We affirm substantially for the reasons set forth in that opinion." (109a)

It is apparent that the court treated the subject *coram nobis* petition as if it were in fact no more than a motion to recuse Judge Palmieri and/or Judge Gagliardi. In treating the petition in this manner, the court below failed to address the underlying merits of the petition, and thereby sanctioned an egregious departure by the District Court from the usual, and constitutional, course of judicial proceedings.

POINT I

The Petition Was Sufficient in Fact and Law.

Petitioner noted that the writ of error *coram nobis* "is the sole remedy available to review and correct an unjust judgment that occurred in 1967." *United States* v. *Morgan*, 346 U.S. 502, 512; 98 L.Ed. 248, 74 S.Ct. 247 (1954); *United States* v. *Cariola*, 323 F.2d 180, 184 (2d Cir. 1963).

The memorandum submitted to the District Judge fully developed that Wolfson's judgment of conviction rendered some thirteen (13) years earlier in the same court should be vacated or at the minimum that an evidentiary hear-

ing should be held since the judgment of conviction was obtained as the result of fundamental errors of constitutional proportion, *United States* v. *Keogh,* 417 F.2d 885 (2d Cir. 1969); that the errors described were extrinsic to the record of the trial *Moon* v. *United States,* 106 App. D.C. 301, 272 F.2d 530 (D.C. Cir. 1959); that the error engendered by prosecutorial suppression of exculpatory evidence in violation of Wolfson's Fifth Amendment rights and the holding of *Brady* v. *Maryland,* 373 U.S. 83 (1963) and its progeny, was unknown in fact at the time of the trial without fault on petitioner-appellant's part, *United States* v. *Cariola,* 323 F. 2d 180 (3d Cir. 1963); and further that if the exculpatory material suppressed as a result of the aforesaid prosecutorial misconduct had been available to the petitioner-appellant at the time of trial, the judgment of conviction would have been prevented. *Allen* v. *United States,* 162 F.2d 193 (6th Cir. 1947). Finally, it is beyond peradventure that the factual matters that Wolfson sought to have reviewed are of the utmost gravity.

The very essence and substantiation of Wolfson's request to Judge Gagliardi for a writ of error *coram nobis* or in the alternative the holding of an evidentiary hearing pursuant to *United States* v. *Keogh, supra,* and *United States* v. *Morell,* 524 F.2d 550 (2d Cir. 1975) was that his conviction in the Continental trial was achieved as the direct outcome of prosecutorial misconduct whereby exculpatory documents and evidence critical to the defense were suppressed by the trial prosecutor in violation of petitioner-appellant's constitutional guarantees and the holdings of *Brady, Keogh* and *Morell* among others. The argument was founded on the clear legal and factual basis of a violation of Wolfson's constitutional rights as a result of prosecutorial impropriety. The exculpatory docu-

mentary material submitted to Judge Gagliardi, as exhibits to the memorandum of petitioner, only became available to Wolfson for the first time in the latter part of 1975 under the Freedom of Information Act as amended, 5 U.S.C. §552, long after Wolfson's time to appeal had expired and after the preparation of the initial petition for a writ of error *coram nobis* and its submission before Judge Palmieri on May 16, 1975.*

The District Court after approximately eleven (11) months rendered a decision that considered Wolfson's application for a writ of error *coram nobis* in a context entirely different from that which was presented for its consideration. Judge Gagliardi gave no credence to Wolfson's *Brady* claim but rather adverted to petitioner's factual support for his *Brady* argument in such a manner as to derogate from the constitutional issue which formed the basis for the writ of error *coram nobis* relief sought. Thus, the opinion denying Wolfson's petition as failing to meet the standard required for *coram nobis* relief, inaccurately described the nature of Wolfson's petition variously as follows:

> In the instant petition, Wolfson alleges that newly discovered evidence, obtained under the Freedom of Information Act . . . and as a result of court orders, warrants the relief sought. For the reasons set forth below, the petition is denied. (88a)
>
> • • •
>
> Wolfson argues that he has discovered new facts through recently obtained evidence heretofore un-

* None of the exculpatory exhibits set forth were the result of Government disclosure except for the excised pages of Morley's 1965 SEC testimony in 1968 after Wolfson's conviction in the Continental trial was obtained and final. It was only as a result of passage of the Freedom of Information Act in 1975 and recourse thereto that exculpatory material was finally revealed.

> available to him, which would have resulted in his acquittal had the facts been known during the Continental trial. (97a)
>
> • • •
>
> (Petitioner's) claim stripped to its bare essentials, is simply one of violation of 18 U.S.C. Section 3500. As such, this court is barred from addressing the merits of this claim . . . (100a-101a)
>
> • • •
>
> Under any standard of *coram nobis*, this court may not consider it again. (102a)*

None of the foregoing statements by Judge Gagliardi fairly characterizes the legal basis of Wolfson's petition. Moreover, the only allusion in Judge Gagliardi's opinion to Wolfson's real claim of a deprivation of his constitutional rights as discussed in *Brady* and its successors even misstates the nature of that claim before dismissing it without any exposition. (98a-99a; 19a-20a)

Since the claim of petitioner met all the requirements necessary to invoke the remedy of a writ of error *coram nobis*, the courts below erred in denying Wolfson's request. The error is of constitutional dimension.

---

* Wolfson's petition, in seeking relief under *Brady*, did not seek to relitigate anything already reviewed by any other court.

POINT II

The Deliberate Suppression of Vital Exculpatory Documents Mandates Relief.

The due process ground for disclosure by the trial prosecutor was brought into sharp focus by this Court in its 1963 decision in *Brady* v. *Maryland*, *supra*, wherein the Court made clear that the cornerstone of the due process inquiry is the guarantee of a fair trial rather than the formulation of deterrents to prosecutorial impropriety. In *Brady*, the defense had requested the prosecution to allow examination of extra-judicial statements of a codefendant. In purportedly acceding to this request the prosecution withheld one statement wherein the codefendant admitted to the shooting for which Brady was accused. The Court held that the suppression was a violation of due process, emphasizing that:

> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' 373 U.S. at 87-88.

Likewise, In *United States* v. *Agurs*, 427 U.S. 97 (1976), in dealing with the application of the *Brady* rule and the standards to be applied in deciding the significance of a failure to comply with *Brady*, this Court delineated three different situations and enunciated a standard of "materiality for each situation. The first situation involved is where "the undisclosed evidence demonstrates that the

prosecution's case included perjured testimony and that the prosecution knew or should have known, of the perjury." * 427 U.S. at 104. In such cases the court said a strict standard of materiality will be applied and a conviction "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." The "second situation . . . is characterized by pre-trial request for specific evidence. (In such an instance) the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." *Id.* at 105. The third category comes about when a general request or no request is made. Here a conviction will be reversed under a standard of materiality as to whether the undisclosed material might create "a reasonable doubt that did not otherwise exist." *Id.* at 113.** Of greatest consequence in assessing the holding of *Agurs* is the statement of this Court concerning the nature of the duty of the prosecutor in making disclosure as it relates to the court's "overriding concern with the justice of the finding of guilt."

Given these legal precedents, it is clear that a constitutional violation has been committed herein.

---

* It is this first situation that now confronts this Court.

** The facts of the present case establish that even under this standard a reversal is mandated of Wolfson's conviction in the "Continental case."

CONCLUSION

The Court of Appeals, by affirming the denial by the District Court of the petition for a writ of error *coram nobis*, has deprived petitioner of his Fifth Amendment rights and sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings, so egregious as to mandate review by this Court.

Respectfully submitted,

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39 East 68th Street
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Of Counsel:

JOHN A. KISER
A Member of The
Bar of this Court

APPENDIX

APPENDIX

Petition for a Writ of Error *Coram Nobis*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Cr. 720

LOUIS E. WOLFSON,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

SIRS:

PLEASE TAKE NOTICE that upon the indictment, the affidavit of Roy M. Cohn, Esq., sworn to the 28th day of November, 1978, the verification of Louis E. Wolfson sworn to the 28th day of November, 1978, and the accompanying memorandum of law and facts with exhibits annexed thereto, a petition for a writ of error coram nobis will be made before the Hon. Lee P. Gagliardi, United States District Judge for the Southern District of New York, at a time and place to be fixed by the court, to an order pursuant to Title 28 U.S.C. Section 1651 vacating the judgment of conviction heretofore entered by the Court on November 28, 1967 or in the alternative ordering an evidentiary hearing on the ground that petitioner Wolfson's conviction was obtained in violation of Wolfson's Consti-

tutional Rights under the Fifth and Sixth Amendments; and for such other and further relief as to this Court may seem just and proper.

Yours, etc.,

SAXE, BACON & BOLAN, P.C.
39 East 68th Street
New York, New York 10021
(212) 472-1400

ROY M. COHN
ROY R. KULCSAR
Of Counsel

Affidavit in Support of Petition for Writ of Error *Coram Nobis*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
66 Cr. 720

LOUIS E. WOLFSON,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Defendant.

State of New York,
County of New York—ss.:

ROY M. COHN, being duly sworn, deposes and says:

I am an attorney duly licensed to the practice of law in the courts of the state of New York, am associated with the firm of Saxe, Bacon & Bolan, P.C., located at 39 East 68th Street, New York, New York 10021, and am fully familiar with facts and circumstances of this matter. I submit this affidavit in support of petitioner's application pursuant to Title 28 U.S.C. Section 1651 for a writ of error *coram nobis* (illegible) judgment of conviction heretofore entered by this Court (66 Crim. 720) or in the alternative granting an evidentiary hearing the ground that petitioner Wolfson's conviction was obtained violation of Wolfson's Constitutional Rights under the Fifth and Sixth Amendments.

Petitioner Wolfson and one other person, Elkin Gerbert, were indicted in September of 1966 (a copy of which is annexed hereto as Exhibit A). They were charged with violating and conspiracy to violate Section 5 of the Secu-

rities Act of 1933, 15 U.S.C. §77(e) in connection with the sales of the common stock of Continental Enterprises, Inc. ("Continental").

Louis Wolfson was neither an officer nor a director of Continental, although he was a controlling stockholder. It was the essence of the charge against Wolfson that prior to his sales of Continental stock Wolfson was required to file a registration statement in which he had to report that he was selling his stock and that although Wolfson knew of the aforesaid requirement he willfully sold his stock without the filing of a registration statement.

Petitioner pleaded not guilty, and trial before the Hon. Edmund L. Palmieri commenced on September 6, 1967. On September 29, 1967, the jury rendered a verdict of guilty on all counts against Wolfson and his co-defendant, Gerbert. On November 28, 1967 Wolfson was sentenced to concurrent one year prison terms on each count, fines totalling $100,000, and to pay the "costs of prosecution" under 18 U.S.C. §1918(b).

The conviction was appealed to the United States Court of Appeals for the Second Circuit, but the conviction was affirmed, 405 F.2d 779 (1968). Certiorari was denied by the United States Supreme Court, 394 U.S. 946 (1969).

A motion for a new trial on grounds of newly discovered evidence was made on October 9, 1968. This motion related to the question of the legitimacy of a crucial document (denominated as Government's Exhibit 21). An evidentiary hearing was had on the motion before Judge Palmieri, who denied the motion, 297 Fed. Supp. 891 (1969). This denial was subsequently affirmed on appeal to the Second Circuit, 413 F. 2d 864 (1969).

Petitioner paid his fine and the costs of prosecution and serve his sentence. Wolfson was released from the

Affidavit in Support of Petition for Writ of Error Coram Nobis

Federal Correctional Institution at Elgin Air Force Base in Florida on January 26, 1970.

On May 18, 1975 a petition for a writ of error *corum nobis* was filed on behalf of Wolfson pursuant to 28 U.S.C. §1651 which petition requested the Court to reopen the case on numerous grounds.

The petition was referred to the Hon. Edmund L. Palmieri, whereupon a motion for recusal was made on behalf of Wolfson on June 18, 1975. Judge Palmieri denied the motion for recusal in an opinion rendered on July 23, 1975.

Reconsideration of his denial of the motion for recusal was granted by Judge Palmieri after which he adhered to his denial of said motion in an opinion dated September 16, 1975.

Subsequent thereto, Bernard Fensterwald, Esq., attorney for petitioner, submitted an affidavit dated November 7, 1975 in response to an order of Judge Palmieri dated September 16, 1975 which order required counsel to "clarify" the nature of the petition that had been filed on behalf of Wolfson. Included in the Fensterwald affidavit was an an additional subject upon which petitioner would propose to question Judge Palmieri at an evidentiary hearing on his writ of error *coram nobis,* i.e., the *Court's handling* of the excision of 3500 material. This additional subject came about as the result of the SEC documents obtained in 1975 following amendment of the Freedom of Information Act of in 1974.

On July 26, 1976 an opinion was filed by Judge Palmieri which denied Wolfson's petition in all respects.

The decision of Judge Palmieri in denying the petition for a writ of error *coram nobis* and the motion for recusal was appealed to the Second Circuit. In a decision ren-

dered on June 3, 1977, the Court of Appeals affirmed the action of Judge Palmieri, 558 F.2d 59 (1977).

On November 10, 1977 a "miscellaneous" motion was made on behalf of Wolfson seeking leave to take depositions of Messrs. Milton S. Gould and Seymour Glanzer, for the purpose of perpetuating their testimony pursuant to Rule 27 of the Federal Rules of Civil Procedure and 28 U.S.C. §1651. In addition thereto an order was sought under Rule 6(e) of the Federal Rules of Criminal Procedure disclosing the grand jury testimony given by Joseph M. Glickstein, Esq., one of Wolfson's trial attorneys, before the very grand jury that indicted Wolfson in *United States* v. *Wolfson,* 66 Cr. 720 (the *Continental* case). When these motions were referred to Judge Palmieri, a further motion was made under 28 U.S.C. §445 asking Judge Palmieri to disqualify himself.

The motion for recusal was denied by Judge Palmieri in an opinion dated June 15, 1976, which opinion also decided the other motions. The disclosure of the grand jury minutes was granted and the motion for leave to take depositions was denied. After ruling on the motions and filing its opinion, the Court requested that any further responsibility for these proceedings be assigned to another judge.

The present petition filed on behalf of Louis Wolfson pursuant to 28 U.S.C. §1651 seeks redress on *specific* and circumscribed issues not raised in any previous application, petition or appeal relating to the conviction of Wolfson eleven (11) years ago. The issues raised in the instant petition, as is clearly established in the accompanying memorandum of law were not available for consideration at trial or on appeal therefrom. The factual infor-

mation that underlies the latest petition for a writ of error *coram nobis* on the issue of prosecutorial suppression of material in violation of Wolfson's Constitutional Rights under the Fifth Amendment and the holding of *Brady* v. *Maryland,* 373 U.S. 83, 10 L.Ed. 2d 215, 83 Sup. Ct. 1194 (1963); *United States* v. *Keogh,* 417 F.2d 885 (2nd Cir.) coram nobis is a remedy to be applied to compelling circumstances and to correct errors of fundamental character. The circumstances and errors now brought before this Court are indeed of the most compelling nature and fundamental character.

It is respectfully submitted that based upon the facts and law as set forth in this affidavit, the verification of Louis Wolfson in support of the petition and the accompanying memorandum of facts and law, the requirements for the granting of this writ, have been fully satisfied.

Based on the foregoing, it is most respectfully submitted that this Court should issue a writ of error *coram nobis* vacating petitioner's judgment of conviction, or in the alternative, granting an evidentiary hearing; and for such other and further relief as to this Court may seem just and proper.

/s/ Roy M. Cohn
Roy M. Cohn

Sworn to before me this
28th day of November, 1978

/s/ Susan Bell
Susan Bell
Notary Public State of New York

Affidavit in Support of Petition for Writ of Error Coram Nobis

VERIFICATION

I, LOUIS E. WOLFSON, have read the above Petition, the Affidavit submitted therewith, the Memorandum of Law and Facts in support thereof, and hereby swear on penalty of perjury that the facts set forth therein are true and correct to the best of my knowledge and belief.

/s/ LOUIS E. WOLFSON
Louis E. Wolfson

STATE OF FLORIDA
COUNTY OF DUVAL

Before me personally appeared Louis E. Wolfson, to me well known and known to me to be the person described in and who executed the foregoing instrument, and acknowledged to and before me that he executed said instrument for the purposes therein expressed.

WITNESS my hand and official seal, this 28th day of November A. D., 1978.

/s/ Illegible
Notary Public
State of Florida at Large
My commission expires ....Illegible....

Memorandum of Law in Support of Petition

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Indictment No. 66 Cr. 720

LOUIS E. WOLFSON,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S MEMORANDUM OF LAW

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Memorandum of Law in Support of Petition

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Memorandum of Law in Support of Petition

INTRODUCTION

This writ of *coram nobis* presents all of the elements mandated by the law on the subject on this circuit. It is the sole remedy available to review and correct an injust judgment that occurred in 1967. *United States* v. *Morgan,* 346 U.S. 502, 512; 98 L.Ed. 248, 74 S.Ct. 247 (1954); *United States* v. *Cariola,* 323 F.2d 180, 184 (3rd Cir. 1963). The affidavits, exhibits and chronology submitted herewith in support of a hearing on the writ, demonstrate that based upon facts unknown to plaintiff at the time of trial and indeed until very recently—facts establishing occurrences as to which he was not only unaware at trial time, but was deceived, and finally, facts which if known, would have produced a different result. *Moon* v. *United States,* 106 App. D.C. 301, 272 F.2d 530 (D.C. Cir. 1948), cert. den. 334 U.S. 849; *United States* v. *Cariola, supra; Allen* v. *United States,* 162 F.2d 193 (6th Cir. 1947).

The new facts arise primarily from three sources:

1. The amended Freedom of Information Act of 1974. Petitioner successfully sued thereunder in the United States District Court for the District of Columbia (Judges Waddy and Harold Greene). As a result, he has obtained and was still obtaining as recently as several weeks ago, hitherto unrevealed documents with material bearing on the issues herein;

—2—

2. A deposition taken by petitioner pursuant to an order of the United States District Court for the Middle District of Florida (Chief Judge Young) on September 26, 1976, of one Anthony Englese, the superior of John Morley—the key witness against Mr. Wolfson; and

3. The availability to petitioner in August, 1978, of the minutes of the Grand Jury testimony of one of his attorneys a few days prior to petitioner's indictment.

This brings us to the issues on this petition. Briefly stated, petitioner became the first person in this country to be prosecuted criminally for violating Section 5 by selling unregistered stock in an amount that exceeded the legally permissible limit under Rule 154 or the 1% rule. To the best of our knowledge, he continues to have this dubious distinction as no other person has been similarly prosecuted to this date—some ten years later. The stock was of Continental Enterprises (an unlisted corporation not required to meet any SEC reporting requirements until the law was changed in 1965) and almost simultaneously, petitioner was separately indicted (by the same prosecutor and grand jury) and tried on charges involving Merritt, Chapman & Scott Corp. Both trials were had before Judge Palmieri. The *Merritt* conviction was reversed by the Court of Appeals. On retrial two juries hung heavily in Mr. Wolfson's favor, and the case was ultimately disposed of by a plea of nolo contendere to a substantially

reduced charge and a small fine. Thus, only the *Continental* conviction remains as a blur on the life-time record of achievement in business, civic and communial life, and the sports world attained by Louis Wolfson.

The issues raised herein are: 1. has the newly available material so totally changed the context of the trial, and 2. would a different result have occurred? There were two key pieces of evidence that permeated and dominated the *Continental* trial. One was the testimony of John Morley, Mr. Wolfson's principle stock-broker, over the years first with A. M. Kidder, and then with Reynolds & Co. Morley

testified he had put the defendants on notice as to the requirements of Section 5. Wolfson denied this. So crucial was Morley's credibility that Judge Palmieri charged the jury:

> "You have to decide—it is going to be one of the important responsibilities you will have in this case, to decide whether you believe Morley on the one hand or whether you believe Gerbert or Wolfson on the other hand, because depending upon which one of these witnesses you believe it will take you a considerable way on the road to deciding the controversial issues in this case." (Transcript p. 2556.)

Morley's credibility was the key. The second turning point was a dramatic piece of rebuttal testimony, in which the prosecution produced an S.E.C. official named Duncan. Duncan had no independent recollection of any facts about a previous incident with Wolfson on October 12, 1950. However, on being shown a memorandum prepared in 1950

(government Ex. 21) by a colleague of Duncan's, Duncan stated that his recollection was refreshed concerning a meeting he attended at the S.E.C. on October 12, 1950, at which Mr. Wolfson was thoroughly briefed on Section 5 and registration requirements, in connection with an investigation of another stock issue, that of Capital Transit (a listed company that was within the S.E.C. reporting requirements at the time of the meeting in 1950).

This evidence enabled the prosecutor to persuasively argue to the jury on summation that Wolfson was an old hand at understanding and violating Section 5, and that had gotten away with the same thing back in 1950;

> ". . . you are entitled to conclude that the documents that support Morley's testimony, together with his testimony . . . far outweigh the kind of self-serving statements that you heard mouthed from the stand [by Wolfson], the echo of 17 years ago, the attempt of a man to put over on this jury the kind of representation that he succeeded in putting over back in 1950." (Transcript p. 2494.)

Now to the new evidence presented in this petition. Two crucial exhibits unearthed in 1975 now establish that the 1950 S.E.C. investigation was not of Louis Wolfson at all, but of other people, including A. M. Kidder, as a direct result of sales handled by the prosecution's key witness, John Morley. They also establish that in no way did the investigation involve Section 5 at all, but was addressed to other aspects of S.E.C. regulations. Had these facts been known, the prosecutor's poisonous argument—if made

at all—could have been easily rebutted. Similarly, as to Morley; the recent Englese deposition established that: 1. when Morley first testified before the S.E.C. on the *Continental* matter in 1965, he was accompanied not by his personal attorney, but by one Anthony Englese, the enforcement attorney for Morley's employer (Reynolds & Co., which had bought assets including Morley's services, from A. M. Kidder). Englese conceded that his appearance as Morley's "attorney" was in effect a subterfuge to get him into the closed-door hearing and observe Morley's testimony. Following this pattern, the 1976 deposition next established that it was Englese who accompanied Morley to the prosecutor's office, obviously when the deal was made for Morley to be a prosecution witness. What was

the deal? The facts answer that. Despite the fact that Morley's company (Kidder) and not Louis Wolfson, was a 1950 target, despite conceded extensive and repeated S.E.C. violations by Morley through Kidder and then Reynolds & Co. after the takeover—never was Morley nor either of his violating firms prosecuted, nor was even the ritualistic "slap-on-the-wrist"—administrative proceeding ever brought against Morley, Kidder or Reynolds. Shortly after this point in Englese's deposition, he fell back on a refusal to answer further questions, and declined on 21 occasions. An evidentiary hearing with Englese's full testimony can only further strengthen the petitioner's case.

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What a difference at the trial if Morley's credibility could have been destroyed, and the memo introduced through Duncan refuted! ! ! It takes no more than Judge Palmieri's own words to demonstrate that. 2. The Glickstein grand jury minutes of the testimony of Joseph Glickstein, Mr. Wolfson's long-time attorney, and co-counsel in the *Continental* and *Merritt* cases, were made available to petitioner for the first time in August 1978. They show a warning to Glickstein that he was a prospective defendant in the *Merritt* case, and a musical-chairs game between him and the prosecutor as to which questions propounded to Mr. Wolfson's attorney were covered by the attorney-client privilege and which were not. At one point it became so ludicrous that it took on all the aspects of a quiz show guessing game.

> "Q. [by Armstrong] Well, you certainly can't mean, sir, that—well, you certainly can't mean what you say. You said that you can recall no conversations that aren't covered by the privilege. Clearly, that is a little broad on its face.

"A. [by Glickstein] May I explain what I intended to mean by that. [sic]

"Q. Yes.

"A. I don't want it assumed, because of the fact that this privilege exists, and which is a privilege that I cannot wave, that when I mentioned the privilege, that something was said confidentially or that something was not said." (Page EJC 9 of Glickstein testimony before Grand Jury on September 14, 1966.)

These minutes must now be read in light of Mr. Wolfson's oath that he never knew in advance of Glickstein's grand jury appearance, gave no waiver of his Sixth Amendment

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Rights nor his attorney-client privilege at all, and was also kept in the dark as to Glickstein's being personally represented before the grand jury by Mr. Wolfson's chief trial counsel, Milton Gould. This makes imperative the taking of Gould's testimony on this subject, as well as the personal matter involving himself before the S.E.C. while he was acting as Wolfson's lead defense counsel.

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ARGUMENT

The Prosecutorial Misconduct Which Caused the Suppression of Exculpatory Documents and Evidence That Was Critical to the Defense Compels an Order Vacating the Judgment of Conviction or in the Alternative the Holding of an Evidentiary Hearing.

The first issue which her confronts this Court (as with the others) has not been previously raised by petitioner. In point of fact, the reason, that this first issue was not presented on appeal from the judgment of conviction is

that the information and documents that establish petitioner's allegations were not available until 1975 following passage of the amended Freedom of Information Act—eight years after Wolfson's conviction. The evidence obtained under the Freedom of Information Act was not even available at the time of the filing of Wolfson's *coram nobis* petition in May of 1975 and was only superficially referred to in a supplemental affidavit to the petition which was submitted by counsel in November of 1975.

Petitioner contends that the prosecutor, Mr. Armstrong, by means of fraudulent representations to the trial court, deceived Judge Palmieri into excising critical pages of the testimony given before the S.E.C. in 1965 by John Morley, a key prosecution witness. In achieving this excision by perpetrating a fraud upon the Court and in violation of Wolfson's Fifth Amendment Rights under the holding of *Brady* v. *Maryland,* 373 U.S. 83, 10 L.Ed.2d 215, 83 Sup. Ct. 1194 (1963), and its progeny, Armstrong achieved three results: (1) the defendant was prevented from obtaining information contained in the excised pages

that would have seriously injured the credibility of Morley, a key prosecution witness, during cross-examination;[*a] (2) he prevented the disclosure of a memorandum[*b] referred to in the excised pages which would have caused the jury

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[*a] See exhibit A excised pages of Morley's 1956 SEC testimony.

[*b] This memorandum dated November 1, 1950 was that of A.M. Kidder (the brokerage that employed Morley) "to Partners, Branch Office Managers, Registered Representatives and Department Heads" setting forth procedures to be implemented in order to assure compliance with SEC regulations regarding sale of control stock. This "Kidder memorandum" resulted from a 1950 SEC investigation of Kidder involving sales by Morley that were violative of Section 5 of the SEC Act of 1933—See Exhibit B.

to discount totally the testimony of Morley and (3) the defendant was precluded from obtaining access to the SEC files containing exculpatory evidence and wherein were contained a copy of the Kidder Memorandum and from which the prosecutor obtained government exhibit 21*c a crucial piece of evidence that was misused by Mr. Armstrong to gain an unjust conviction.

If the defense had obtained the "Kidder Memorandum" and the SEC files wherein were contained the memorandum and from which the prosecutor obtained exhibit 21, as required under *Brady,* Armstrong would have been forestalled from misusing exhibit 21 to: firstly, fraudulently impugn the credibility of Wolfson during cross-examination by inferring that Wolfson's meeting with SEC officials on October 12, 1950 was of such importance to Wolfson that he had to be lying when he could not recall the meeting; secondly, unjustifiably impute knowledge of Section 5 of the SEC Act of 1933 to Wolfson by virtue of Wolfson's presence at the meeting of October 12, 1950,

which knowledge was required to be shown beyond a reasonable doubt in order to find Wolfson guilty at trial, and thirdly, falsely and fraudulently, lead the jury to conclude that Wolfson was the target of an investigation by the S.E.C. in 1950 for the same acts as charged in the indictment whereas, in truth and in fact, as Mr. Armstrong knew, Louis Wolfson was not the subject of an S.E.C. investigation in 1950 regarding violations of Section 5 of the S.E.C. Act of 1933. It was this latter, improper and fraudulent use of exhibit 21, that allowed Armstrong to

*c Exhibit 21 was a memorandum of a meeting attended by Wolfson and others at the SEC on October 12, 1950. See exhibit C annexed hereto.

rally the jury to his hollow outcry—don't let Wolfson get away with the same thing he got away with seventeen years ago! In poit of fact, Armstrong's unbounded desire to assure the conviction of Louis Wolfson was so unbridled that the prosecutor in summation fraudulently and perniciously invited the jury to conclude erroneously that exhibit 21 linked Wolfson to the commission of a *crime* in 1950

> With respect to Government's Exhibit 21 Mr. Gould [defense counsel for Louis Wolfson] has added a new dimension to an old legal concept. There is such a thing as a statute of limitations, that after a certain period of time following a CRIME a man cannot be prosecuted for it on the grounds that the evidence may have grown cold and he may not be able to defend himself. (Emphasis added.) (Tr. 2420.)*

Before turning to a consideration of the legal decisions

that must be evaluated in deciding the issues presented to this Court, it is imperative that a full and complete understanding of the factual setting that resulted in petitioner's conviction be understood. The argument of the prosecutor in his opening, the evidence he sought to elicit during his direct and rebuttal case, his summation (wherein Armstrong fraudulently told the jury not to allow Wolfson to get away with the same criminal conduct he had engaged in seventeen years ago) and finally the charge of Judge Palmieri to the jury emphasized the key issue that was contested throughtout the trial—Wolfson's knowledge that his sales of Continental stock as charged in the indictment were in violation of Section 5 of the S.E.C. Act

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* Page references are to trial transcript and designated "Tr."

of 1933. It was this core of knowledge about which all the other facts of the case revolved.

We now turn to the record of the Wolfson trial to evaluate the importance of both that which was recorded and that which never came before the jury because of its wilful suppression by the Government. We first consider the case from the perspective of the charge given by Judge Palmieri and the opening and summation of the prosecutor, Mr. Armstrong, as it relates to the conviction of Louis E. Wolfson 11 years ago. At page 2539 of the transcript, Judge Palmieri charged on the law that

> "The fourth element which you must consider, and which presents a seriously contested issue in this case,
>
> —12—
>
> is this: does the evidence establish beyond a reasonable doubt that each defendant knew that the offer, delivery or sale of Continental Enterprises, Inc. stock required, under the law, the filing of a registration statement . . ."

It was proof of the element of knowledge on the part of the petitioner herein that was the necessary cornerstone to the conviction of Louis Wolfson. While other factors necessary to the Government's case were contested by the defense in varying degrees, the element of Wolfson's knowledge was placed in bitter dispute.

Despite the complexity involved in presenting the facts before the jury, in a case that dealt with activities in the sale of millions of dollars of stock over a number of years by various persons in the "Wolfson group" through numerous stock brokers, the observation of the prosecutor in his opening was indeed accurate.

". . . [I]t is a simple case . . ." (Tr. 133)

"... [T]hat is exactly what the defendants did ... they violated this basic law of the securities industry by willfully and *knowingly* selling ... their stock ... to the public without filing the required registration statement." (Tr. 134) (Emphasis added.)

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In outlining the means by which the prosecution would prove its case emphasis was placed on two factors: firstly, testimony that would be elicited from the "one type of broker who was very, very aware of the Securities Act and its requirements ... and specifically warned ... Mr. Wolfson of the requirements of the Securities Act" (Tr. 14) and secondly, that Wolfson "had dealings with the Securities and Exchange Commission where the various rules of the SEC were in fact explained ... (Tr. 146). By false implication and fraudulent innuendo, the prosecutor led the jury to conclude that this second factor was the result of an SEC investigation of Wolfson in 1950 for the same acts for which he was now on trial. (In truth and in fact, as is now demonstrable for the first time, and as the prosecutor well knew, Louis Wolfson was not investigated for Section 5 violations by the SEC in 1950.) These two factors were, in point of fact, embodied in the testimony of two witnesses for the prosecution—John Morley and James Duncan.

The significance of these two prosecution witnesses presaved in the opening of Mr. Armstrong was ....(illegible).... summation. After noting "how scrupulous ....(illegible).... (Tr. 2407), he stated:

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I said at the outset that this was a simple case and I stick by it. It is a simple case. It could come down to just two documents, just two documents, Govern-

> ment's Exhibit 4-N [introduced through Morley][*a] and Government's Exhibit 21[*b] [introduced through Duncan]. Tr. 2418.

After further emphasis of the significance of Duncan's testimony and Exhibit 21, Armstrong again noted that

> It boils down simply to this: Did the defendants know that selling three million dollars worth of stock in a company controlled by them was against the law. (Tr. 2423)

This element of knowledge was again highlighted by Mr. Armstrong shortly thereafter:

> The key issue in the case . . . is the question of knowledge: Did these defendants know when they made these sales that there was a law that required them to file information available to investors before they sold their stock?
>
> The most dramatic evidence in the case with respect to the knowledge of any defendant is Exhibit 21. (Tr. 2441, 2442)

After sarcastically noting that during Wolfson's testimony he was unable to recall the meeting attended by Wolfson

and Duncan 17 years earlier as contrasted to the ability of Duncan to recall the meeting (Tr. 2444), Armstrong invited the jury to conclude that Wolfson was endeavoring

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[*a] Exhibit 4N was a memo prepared by Morley and signed by Gerbert from which knowledge of Section 5 requirements was imputed to Gerbert and Wolfson by Armstrong. See Exhibit D annexed hereto.

[*b] See exhibit C annexed hereto and previously referred to.

to get away with the same thing during the trial that he got away with on October 12, 1950—feigning unfamiliarity with the SEC law (Tr. 2446) to avoid responsibility for its knowing and willful violation. Wolfson's inability to recall the October 12, 1950 meeting with Duncan was cunningly used by Armstrong as a bludgeon to strike down Wolfson's credibility. Wolfson's lack of recollection of the meeting was as important a weapon in Armstrong's arsenal as was the information supposedly imparted to Wolfson at the meeting. Moreover, and perhaps of greatest consequence in Armstrong's fraudulent use of exhibit 21 was the totally false impression Armstrong conveyed to the jury that Louis Wolfson was the target of an investigation by the SEC in 1950 for the very same acts that lead to his being on trial.

> [T]here is an additional significance to this document [Exhibit 21], and that is that Mr. Wolfson did take the stand, . . . and he sat there and he tried—he had the nerve to try to put over on this jury the idea that he was as innocent today as he pretended to be on August 12, 1950 . . ." [sic]* (Tr. 2453)

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It was a question of Morley's credibility versus that of Wolfson.

> He [Morley] had a course of conduct and he testified at length. . . If you don't believe that John Morley

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* The meeting of October 12, 1950 that gave rise to (illegible) inaccurately set forth in the transcript of Armstrong (illegible) as August 12, 1950 (illegible)

> is an arrant liar you have got to convict these defendants. (Tr. 2464)
>
> . . .
>
> I submit to you that there cannot be any question that John Morley consistently attempted to keep Mr. Wolfson . . . within the requirements of the law. . . . (Tr. 2466).

In concluding his summation, Armstrong once more told the jury that "this case can be decided on the basis of two documents, Exhibit 21 and Exhibit 4-N" (Tr. 2493) which exhibits were given substance and meaning by the testimony of Duncan and Morley respectively.

> [Y]ou are entitled to consider the testimony of John Morley . . . as the testimony of an honest man, . . . and that you are entitled to conclude that the documents that support Morley's testimony, together with his testimony . . . far outweigh *the kind of self-serving statements that you heard mouthed from the stand, the echo of 17 years ago, the attempt of a man to put over on this jury the kind of representation that he succeeded in putting over back in 1950.* (Tr. 2494) (*Emphasis added*).

Turning once more to the charge of Judge Palmieri, the Court, while discussing the legal element of culpable knowledge attributable to Wolfson, which element the prosecution had to prove beyond a reasonable doubt, marshalled the evidence and placed strong emphasis on the roles played by Duncan and Morley ("a very important

witness" Tr. 2587). Wolfson's meeting with the SEC Re-

gional Director on October 12, 1950 (referred to in exhibit 21) and the information allegedly imparted to Wolfson through Gerbert by Morley were highlighted by Judge Palmieri at various times throughout his charge (see Tr. 2543, 2544, 2545, 2547 for example) as being determinative of the issue of knowledge.

> On this issue of intent and knowledge which has been litigated with considerable force in the case, consider . . . The contacts with the SEC. . . Exactly what did happen, and what did those contacts mean in the light of the defendants' background and experience, and what did they point to insofar as their future conduct is concerned (Tr. 2554-55). . . . and there is no hiding the fact that Morley is a very important witness, . . .
>
> You have to decide—it is going to be one of the important responsibilities you will have in this case, to decide whether you believe Morley on the one hand or whether you believe Gerbert or Wolfson on the other hand, because depending upon which one of these witnesses you believe it will take you a considerable way on the road to deciding the controversial issues in this case (Tr. 2556).

Viewed from the perspective gleaned from the remarks of Mr. Armstrong and Judge Palmieri consideration must now be given to the evidence supplied by Morley and Duncan and the critical impact that prosecutorial suppression of pages 87-93 from Morley's 1965* SEC testimony described as Exhibit 3504(a) played on the defense.

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* See exhibit A annexed hereto.

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John Morley's testimony came at the very outset of the trial and other than that of James Duncan's rebuttal evidence, had the greatest significance. Morley portrayed himself as a person who had a relationship with Wolfson that went back to 1942, which was something more than that of a broker-client relationship. He described how as time passed, Wolfson's business grew to the point that it represented as much as sixty to seventy percent of Morley's business at A.M. Kidder and that he did the substantial part of the brokerage business done by Wolfson. Morley testified further as to his meeting with Gerbert in 1948 and that until 1958 either Gerbert or Wolfson would place orders in Wolfson's personal account. In 1958, according to Morley, a disagreement ensued between himself and Wolfson over Wolfson's desire to sell American Motors stock. Notwithstanding this supposed argument (Wolfson disputed Morley's recital of this episode in his testimony), Wolfson continued to use Morley as a broker and substantial shares of Continental stock owned by members of the Wolfson family including those of Louis Wolfson were sold through Morley.* It was the

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sales of Continental stock in 1960-1961 through Morley that formed much of the substantive testimony concerning Louis Wolfson's allegedly improper sale of control stock in violation of Section 5 of the SEC Act of 1933.

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* Trial testimony revealed that millions of dollars worth of stock in different companies was bought and sold by various persons in the Wolfson group through Morley after 1958. It is of great import to note that *none* of the Morley sales of Continental were contained in the indictment. The only purpose to Morley's testimony was an attempt by the prosecutor to show Wolfson's knowledge of Section 5. From the beginning it was to be Morley's credibility against that of Wolfson.

Morley's testimony was of greatest significance in two aspects—his portrayal of himself (and A.M. Kidder) as being scrupulously honest in the handling of what might be considered control stock and concomitant thereto his imparting of knowledge to Wolfson or Wolfson through Gerbert that sale of control stock was regulated by the SEC.

> "Q. Directing your attention to the *entire period of your association with Mr. Wolfson and his associates* . . . did you follow a procedure in placing sell orders in the Wolfson accounts?"
>
> "A. Whenever any sell orders were entered in any of the companies that A.M. Kidder considered control companies of Wolfson, and they entered a sell order, I had to make inquiry as to whether stock had been sold in the previous six months and, before accepting the order, I had to tell them that I would call them back.
>
> I had to check with our New York office to see if the order was acceptable under the SEC regulations." (Tr. 386-87).

It was the import of Morley's testimony that any occasion he received a sell order on a "Wolfson controlled company" (Tr. 389) he discussed "with the defendants" the particular SEC restrictions that would apply depending upon whether the stock was listed or over the counter. (*See*

Tr. 389-90). Despite the leading questions of the prosecutor, Morley did not clarify the exact nature of the information he imparted as to who or what constituted a control person nor did Morley explain what assurances he sought

from the seller regarding other sales that might violate the 1% rule.*

Morley went on to testify that there came a time he began handling sales of Continental stock in 1954 or 1955 for Louis Wolfson and that not too long after this initial transaction, a policy change was instituted regarding Continental sales by "the Wolfson group." (Tr. 419). As a result of learning that this initial order "exceeded by a small amount" (Tr. 419) that allowable under the SEC Act, the New York office instructed Morley that any future sales of Continental stock by "the Wolfson group" would have to conform to Rule 154. It was this supposed policy consideration that led Morley to obtain the memorandum dated January 27, 1961, from Gerbert that was exhibit 4-N.*a This memorandum written by Morley and executed by Gerbert purported to show Gerbert's familiarity with SEC requirements pursuant to conversation with Morley, Morley's "scrupulousness" in following SEC requirements*b

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and criminal intent by Gerbert in his sale of control stock of Continental made in conjunction with the memo.

Notwithstanding that the sales referred to in the 4-N memo and Gerbert's conversation with Morley regarding these sales related solely to sales in Gerbert's *own account**c the prosecutor, by means of improperly leading questions continued to elicit equally improper responses from Morely which purported to connect Louis Wolfson

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* See later discussion of Kidder Memorandum.

*a See exhibit D annexed hereto.

*b This "scrupulousness" is shown to be totally unfounded when one considers that Morley never adhered to the requirements of the Kidder Memorandum.

*c See Tr. 429, 431.

to a sale and document concerning which he, in fact, had no contiguity.

"Q. Mr. Morley, directing your attention again to Government's exhibit 4-N in evidence and to the events occurring on or about the date of that document, did Mr. Gerbert tell you at that time that he had sold in the previous six months stock for Louis Wolfson through other brokers?" (Tr. 433).

"A. No." (Tr. 434).

Shortly thereafter, Morley's direct testimony concluded and the court called a conference to settle questions involving 3500 material with respect to the witness Morley. The pertinent parts of this colloquy are quoted below and present with clarity the artfulness engaged in by the prosecutor in avoiding the *Brady* issue relating to Exhibit 3504-A, as well as, the obvious concern of both defense counsel and Judge Palmieri that the defendant's rights under *Brady* are protected.

"Mr. Armstrong: I am turning over to counsel in an

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excised copy of Exhibit 3504-A, which is a transcript of his SEC testimony of October 18, 1965.

The Government has gone through and excised certain portions which relate not to this investigation but to the Merritt-Chapman investigation. We have indicated the portions excised in your Honor's copy (Tr. 465)."

The court agrees with the excisions which included most significantly pages 87 to 93 (incorrectly set forth in the trial records as 78 to 93 at Tr. 465) after which the ex-

hibit was placed under seal for possible future scrutiny by an Appellate Court. Thereafter, Mr. Armstrong submitted Exhibit 3504 B, C D and E* to Judge Palmieri which exhibits concern interviews and notes of interviews of Morley. When defense counsel inquired as to the availability of the latter four exhibits under *Brady,* Judge Palmieri remarked that:

> "I have that very much in mind and if I saw anything that I thought you should have, I would certainly see that you had it. But I cannot discern any Brady v. Maryland value to these documents and therefore hand 3504-B and C to the clerk . . .
>
> Mr. Armstrong. I have the dubious distinction of being the author of these documents and decoded I can state that even the portions that you can't read, that I have gone over them and I do not feel under Brady v. Maryland that anything there is required to be turned over. (Tr. 466-67)

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Finally, in the course of the Merritt-Chapman trial (subsequent to the completion of the *Continental* trial and Wolfson's conviction therein), Wolfson gained access to Exhibit 2504-A and particularly pages 87-93 of Morley's testimony before the SEC in 1965. The critical significance of these pages to Wolfson's defense at the *Continental*

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* 3504(B) and (C) are notes taken by Armstrong of Morley in 1966 and 1967. 3504(D) and (E) are critical interviews taken of Morley by SEC officials on October 23, 1950 eleven days after the date of Exhibit 21 and the second on March 21, 1952 shortly before Louis Wolfson gave a deposition before the SEC in a separate matter from that of 1950. It is respectfully urged that this Court disclose the contents of these exhibits or, at the minimum, examine them *in camera.*

trial lies in two distinct and equally important areas, firstly Morley's credibility as a witness would have been totally negated in cross-examination solely by virtue of information contained in these pages; and secondly disclosure of the Kidder memorandum and the other material referred to in these pages would have been mandated which would have not only resulted in total destruction of Morley's credibility but would also have enabled the defense to place the subsequent testimony of Duncan in proper context. The Kidder memorandum and the SEC files wherein were contained the memorandum and exhibit 21 would have come to light resulting in the availability of extremely important exculpatory evidence.

The excised pages of Morley's 1965 SEC testimony* referred to below clearly demonstrate that the "scrupulously honest" John Morley and A.M. Kidder had been involved in an SEC investigation concerning unregistered sales going back to 1950, that at the time of Morley's testimony in 1965 after denying unregistered sales in Wolfson accounts that were the subject of the SEC inquiry, Morley suddenly had his "recollection refreshed" concerning such sales, that Morley sought to excuse such improperly made

sales dating back to 1950 in the same manner as he justified his violative sales of Continental in 1961 during his cross-examination at Wolfson's trial. Excised pages 87 to 89 of Morley's 1965 testimony before the SEC contain the following highly significant exchange:

"Q. Going back to the 1950's do you recall that there was ever an inquiry from the SEC as to whether or not there had ever been unregistered sales for

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* See exhibit A annexed hereto.

any of the Wolfson accounts in the stock of Capital Transit Company?"

"A. Yes, sir, there was an SEC man[*a] sent from Washington to Jacksonville and he checked our office very thoroughly . . . And there was never a sale in their accounts with us."

"Q. Did you handle accounts for Saul Wolfson, Cecil Wolfson and Sam Wolfson in 1950".

"A. Yes."

"Q. Well, didn't they sell Capital Transit shares through you in 1950; do you recall that?"

"A. They may have."

"Q. I want to show you a letter from our files dating back to January 11, 1951,[*b] addressed to A.M. Kidder and Company, and I am referring to sales of Capital Transit stock for the account of Saul Wolfson, Cecil Wolfson and Sam, and something called the WYG Venture, and ask you if that refreshes your recollection to any transaction?"

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"A. Sure, that was only 6,984 shares, and it was scattered among all of them, over that year. . . . I didn't know about this letter."

. . .

"Q. I want to show you this document from our files which is on the letterhead of A.M. Kidder and

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[*a] "SEC Man" is Nichols whose interview of Morley on October 23, 1950 was excised under exhibit 3504D, disclosure of which is herein requested.

[*b] See exhibit E annexed hereto.

Company, dated November 1, 1950* and it is an important memorandum to partners, branch office managers and registered representatives and department heads Re violation of Act of 1933.
I wonder if you recall seeing that memorandum?"

"A. Yes, sir."

"Q. Did that memorandum come about as a result of the Commission's inquiry into transactions in Capital Transit Company?"

"A. It might have. But again when Mr. Wolfson was becoming a big factor, a controller of corporations, we began to watch and go very, very carefully with anything that he did." (pp. 87-89 of SEC 1965 testimony by John Morley from Exhibit 3504A).

Also of interest regarding the testimony of "Honest John" *supra,* in his statement that going back to 1951 he and A.M. Kidder "began to watch and go very, very carefully with anything that [Wolfson] did"—however, not closely enough, since the trial record discloses that Kidder and Morley violated the 1% rule on a number of occasions in sales of "Wolfson group control stock" (although Morley endeavored to excuse each of such violations).**

The most meaningful aspect that arises from the prose-

cutor's excision of the aforesaid SEC testimony of Morley has to do with the suppression of the Kidder memorandum and that of the SEC investigatory file relating to an investi-

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* Kidder Memorandum annexed hereto as Exhibit B.

** See Tr. 2562-2564 and discussion of Kidder memorandum, *supra.*

gation of Capital Transit. It was not until 1975, by virtue of the Freedom of Information Act, that the petitioner herein obtained disclosure of the SEC files concerning the investigation of Capital Transit and that the great damage done to his defense at the Continental trial by the prosecutorial improprieties engaged in Mr. Armstrong first came to be realized. Had the prosecutor not sought to excise the most important pages of Morley's 1965 SEC testimony the jury that convicted Louis Wolfson (based in large part on the testimony of Morley) would have learned how "Honest John" and A.M. Kidder had violated the SEC requirements (pertaining to sale of control stock in violation of Section 5 of the SEC Act of 1933) years before, had been put on notice of such violations by the SEC, and faced possible prosecution by the SEC in 1951 which caused Kidder to put all "partners, branch office managers, registered representatives and department heads" on specific notice.

The jury would have learned through the Kidder Memorandum that Morley was under explicit instructions as early as November of 1950 regarding the procedure to be followed in the handling of the sale of stock by members of a control group. This memo resulted from Morley's sale of control stock of the "Wolfson group" (*Not* including Louis Wolfson) and Morley *never* followed that procedure.

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The jury would also have learned that the 1950 SEC investigation from which exhibit 21 was taken was not an investigation of Louis Wolfson but rather that A.M. Kidder was a target of the SEC who eventually censured Kidder for its conduct.

In the particular context of Morley's testimony alone the material deliberately suppressed by the Governmen would

have so substantially affected his credibility that no jury could have found Wolfson guilty beyond a reasonable doubt.* As Judge Palmieri charged the jury:

> The only reason the proof as to Kidder's sales prior to 1960 was permitted was to test the credibility of Mr. Morley, who testified to having applied Rule 154 to the defendants' sales. . . .
>
> *If Mr. Morley's firm consistently and without explanation violated the one per cent rule, then there would be little ground for believing him."* (Tr. 2564) (Emphasis added)

Equally consequential damage to Wolfson's defense resulting from Armstrong's carefully selected excisions and the concomitant prosecutorial suppression of SEC files W 525 and W 557 came about in the course of Wolfson's cross-examination and the rebuttal testimony of John Duncan (exhibit 21).

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The testimony of Louis Wolfson on direct examination explicitly contradicted that of John Morley on the ultimate issue decided by the jury in rendering its verdict namely, Wolfson's knowledge concerning the registration requirements of the SEC Act of 1933. Wolfson stated that he had no knowledge whatsoever concerning the registration requirements for sale of control stock under the SEC Act of 1933.

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* It must here be noted that of utmost significance is the fact that none of the counts in the indictment were for sales of Louis Wolfson through Kidder. The whole purpose of Morley's testimony was to impute knowledge to Wolfson based on the weighing of Morley's credibility versus that of Louis Wolfson.

"Q. Mr. Wolfson, in the years 1960, 1961 and the early part of 1963, did you know what the registration of a security meant?

"A. No, sir." (Tr. 2007)

Wolfson also denied having any conversations with Gerbert concerning any discussions between Gerbert and Morley relating to sales by Wolfson of Continental stock.

"Q. How did you sell it, through what brokerage firms?

"A. I don't know. I gave it to Mr. Gerbert to sell."

. . .

"Q. Did you tell him what brokerage firm to use?

"A. No, sir.

"Q. Did he ever report to you that he had any difficulty selling the stock?

"A. No, sir.

"Q. Did he ever mention to you any conversations that he had with Morley on the subject of selling this stock?

"A. No, sir.

"Q. Did you ever hear one word about any problem connected with the sale of Continental Enterprises stock in 1954, 1955 or at any time up to 1960?

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"A. No, sir.

"Q. Did Mr. Morley ever call you and raise any question?

"A. No." (Tr. 1988-89)

During the course of Armstrong's cross-examination of Wolfson the prosecutor spent considerable time exploring the extent of Wolfson's knowledge of Section 5 of the SEC Act of 1933. Wolfson steadfastly denied awareness of specific provisions of the SEC Act of 1933 as well as any intent on his part to violate any legal requirements regulating sale of Continental stock.

"Q. With respect to Continental, it is your position that as of 1960 through 1962 you were unfamiliar with the requirements of the the Securities Act with respect to the sale of Continental? You knew of no restrictions?

"A. I knew of no restrictions, yes, sir."

. . .

"Q. Specifically, sir, you were unfamiliar with the necessity of complying with Section 5 with respect to your sales of Continental stock?"

. . .

"A. I don't know of any Section 5. I don't know these numbers. I know nothing about rules and regulations."

. . .

"Q. You would assume during this period 1960 to 1962 you did in fact control Continental?

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"A. As far as stockholdings, I would say yes, sir.

"Q. Well, sir, your position is that if in fact there was any violation of the registration provisions of the Securities Act by you or by anyone in your family group in connection with the sales of Continental Enterprises stock, this would have been an entirely

innocent violation without knowledge on your part, is that right?

"A. We wouldn't have done it if anyone said it was a violation of any kind of regulations or rules or laws.

"Q. You had no idea, sir that you or members of your family could not legally sell your stock?

"A. No, sir." (Tr. 2135-2137)

Continuing his prolonged cross-examination of Wolfson regarding Wolfson's knowledge of the SEC Act of 1933 as it regulates public distribution of unregistered securities by a member of the control group, Armstrong interrogated Wolfson on a discussion between Wolfson and SEC officials on October 12, 1950 (almost 17 years prior to the time of Wolfson's trial testimony). Wolfson recalled appearing at the SEC in 1950 or 1951 regarding Capital Transit *with his attorneys* (Tr. 2152). The meeting that Wolfson recalled was at the request of his attorney but he did not "know what it pertained to, if control stock or what." * (Tr. 2154). After inquiring further concerning possible meetings Wolfson might have had in 1950 with SEC people about Capital Transit, Armstrong made specific inquiry about a conference on October 12, 1950.

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"Q. Sir, I direct your attention specifically to October 16, 1950—I direct your attention to October 12, 1950, and ask you, sir, if on that day you had a conference at the Washington Regional Office of

* In point of fact Wolfson's recollection was of a meeting with the SEC in 1952 which meeting, as Mr. Armstrong knew, was totally unrelated to violations of Section 5.

the SEC with E. Russell Kelly, the Regional Administrator, and James Duncan, the Assistant Regional Administrator of the SEC in Washington, D.C.? Do you recall that?

"A. I don't recall. I could have met." (Tr. 2157)

. . .

"Q. Do you recall, sir what people were present with yourself, Mr. Dor [sic] Weinstein and nobody else other than the two attorneys I have mentioned?

"A. No, sir.

"Q. Does that refresh your recollection?

"A. No, sir, I don't recall it, but it could have been." (Tr. 2158)

. . .

"Q. Your recollection is, sir, that you have absolutely —your testimony is that you have absolutely no recollection of any such meeting with Mr. Kelly or Mr. Duncan?

"A. I don't remember any meeting in 1950; it could have happened. If it did happen, I would tell you exactly what I remember of it, and I don't know a thing about it." (Tr. 2159-60)

The thrust of Armstrong's questions was purportedly to ascertain whether on October 12, 1950, Wolfson had "any discussions with anybody at the SEC at that time with respect to the requirements of the securities laws of the United States." (Tr. 2151). Wolfson was unable to recall the October 12th meeting Armstrong had reference

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to and Armstrong made only the most superficial "attempt" to refresh Wolfson's recollection which was of necessity unavailing.

In point of fact a reading of the transcript of Wolfson's cross-examination with the hindsight gained from reading the rebuttal testimony of James Duncan, the introduction of exhibit 21, the unsealing of pages 87-93 from Morley's 1965 SEC testimony (contained in exhibit 3504A) and the discovery of the contents of SEC files W525 and W557 under the Freedom of Information Act in 1975 makes clear that the true purpose of Armstrong's questioning was not to obtain Wolfson's knowledge of events but to create the illusion that Wolfson was the target of a 1950 SEC investigation arising out of violations of Section 5 of the SEC Act of 1933. Armstrong deliberately created the false impression by his questioning of Wolfson that Wolfson was the target of an SEC investigation in 1950 relating to Section 5 violations of the Act of 1933. Armstrong had possession of the SEC files. Armstrong knew that Louis Wolfson was *not* a target of the SEC investigation in 1950 involving sales of Capital Transit stock by members of the "Wolfson group" (excluding Louis Wolfson) in violation of Section 5 requirements of the Act of 1933. He knew that Wolfson had appeared only once at the SEC in 1950. Armstrong knew that the second appearance of Louis Wolfson at the SEC was in April of *1952* when Louis Wolfson appeared with his attorneys and a depo-

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sition was taken. Moreover, Wolfson's deposition was taken concerning an SEC investigation into allegations of violations under the Act of '34 *not* registration under

the Act of 1933. (*Both of these SEC investigations were closed without any finding of impropriety in the actions of Louis Wolfson*).

"A. My attorneys and I appeared before the SEC. I don't know if it was 1950, 1951, on Capital Transit.

"Q. This was in a formal investigation, is that right, sir?

"A. I don't know what kind of investigation.

"Q. Was there a stenographer there who took it down?

"A. I don't remember.

"Q. But your attorneys were with you?

"A. Yes, sir.

. . .

"Q. Do you know whether a transcript was taken? (Tr. 2152)

"A. I just don't know.

. . .

"Q. At that time, sir, were the provisions of the Securities Act, specifically the necessity of a controlling person to register stock, brought to your attention? (Tr. 2153)

"A. I attended a meeting with the SEC at the request of my attorney. I don't know what it pertained to, if control stock or what. I attended that meeting and answered any questions put to me to my best knowledge of answering these questions. I don't recall 17 years ago just what discussion that was about and I just wouldn't know. (Tr. 2154)

The second purpose of Amstrong's cross examination was to create a situation that would allow him to call

Duncan as a supposed rebuttal witness. Armstrong's real purpose in calling Duncan and his use of exhibit 21 was to support by fraudulent means the dubious evidence adduced through Morley concerning possible knowledge of Wolfson regarding the registration requirements of the SEC Act of 1933 and to undermine Wolfson's credibility. It was to this end that Armstrong did not seek to refresh Wolfson's recollection by showing him what later became exhibit 21.*

And so James Duncan became the last witness in the trial of Louis E. Wolfson. As the prosecutor, Mr. Sifton (who conducted the examination of Mr. Duncan) told the Court, while making an offer of proof, the purpose of Duncan's testimony was to "testify to his *recollection* of an interview, a personal interview with Mr. Louis Wolfson . . . in connection with the Capital Transit situation, and in which this witness and the other person from the SEC present at the interview fully explained the terms of Section 5 applicable to a control group situation and brought the provisions of the law fully to this defendant's attention." (Tr. 2235). Mr. Duncan was presumably testifying to his recollection of a meeting that occurred 17 years earlier. However, in point of fact, Duncan's testimony was not to the event but rather to his recollection of reading what became exhibit 21—a memorandum of that meeting pre-

* While trial tactics are an important element in the prosecution of any criminal case when these "tactics" include deliberate suppression of exculpatory evidence, as well as fraud upon the Court, they deserve judicial condemnation.

pared by Kelly of Kelly's personal recollection of the October 12th meeting prepared on October 16th

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"Mr. Gould: Is the witness now reading from the memorandum or testifying?

"The Witness: Testifying from my recollection of having read it." (Tr. 2240)

Duncan's direct testimony consisted of paraphrasing the contents of Kelly's memorandum of October 16, 1950, which in turn paraphrased the meeting between Kelly and Duncan of the SEC and Wolfson and Weinstein on October 12, 1950. At the close of Duncan's "testimony" the Kelly memorandum (which had been taken from the SEC files) became exhibit 21 and was read to the jury. The substance of Duncan's testimony and exhibit 21, according to the prosecutor, was that, during an investigation of Capital Transit, on October 12, 1950, Louis Wolfson was advised by E. Russel Kelly, Regional Director of the SEC, of the requirements of Section 5 of the SEC Act of 1933 concerning restrictions imposed on a member of a control group in making a public sale of his securities. Implicit in the prosecutor's questioning of Duncan and the introduction of exhibit 21 was the fraudulent inference that Louis was the target of that investigation, whereas, in point of fact, as the prosecutor knew Louis Wolfson was not a target of the SEC investigation of Section 5 violations in the sale of Capital Transit stock.

"He was advised that you and your group were controlling persons and that no public offering of stock could be made through a broker or an underwriter

unless there had been compliance with the registration requirements of the Securities Act." (Tr. 2246)

Needless to say the ability of defense counsel to cross-examine a key prosecution witness was entirely thwarted since *the real witness was not James Duncan but exhibit 21*—a seven-page document of a dead man's recollection of events, four days after the event and 17 years before its introduction at trial. Duncan's "recollection" of the meeting with Louis Wolfson was the result of his having "absorbed" the contents of exhibit 21 after having read it three or four times—most recently the day before he testified when he read it a line at a time with the help of a magnifying glass (Tr. 2262-2264).

"Q. [by Gould of Duncan] So from October 16th or thereabouts until—October 16, 1950, or thereabouts until April of this year you didn't even have any sight of that, did you?

"A. No, sir.

"Q. You never discussed with anybody in those shall we say, 16 years?

"A. No, sir.

. . .

"Q. It brought back to your mind everything that happened?

"A. Well, in a general way the whole meeting it brought back." (Tr. 2262)

. . .

"Q. Meaning other than that you didn't have an independent recollection of what was said in that interview?

"A. Only from reading that, it brought back what happened.

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"Q. If I had asked you before you had seen this a few times you wouldn't recall what Wolfson said and Weinstein said and Kelly said?

"A. Hardly in that span of years."

Gould's cross examination of Duncan when viewed today in the light afforded by the disclosure of SEC documents under the Freedom of Information Act shows that Duncan, like Wolfson, was confused about their meetings. Once again the prosecutor allowed this confusion to inure to his benefit when he alone knew that Wolfson and Duncan had not met twice in 1950 in connection with the investigation of Capital Transit.

[Cross examination of Duncan by Gould].

"Q. You had this one meeting with Mr. Wolfson?

"A. I had one another.

"Q. Do you remember when that was?

"A. *That was about that time, maybe slightly before that.* We interviewed, Mr. Kelly and I, Mr. Wolfson under oath, and he was represented by Mr. Manning, his lawyer.

"Q. But you don't have a memory of that?

"A. That was taken by a reporter."

Thus did the prosecutor, by means of his cross examination of Louis Wolfson and the uncorrected error of Duncan's testimony, create the false impression that Louis Wolfson was at the SEC twice in 1950 in connection with an investigation of Louis Wolfson by the SEC during which investigation his deposition was taken. Armed with the knowledge that he had hidden the true facts and that defense counsel could not discern their existence, Armstrong rhetorically asked the jury—under these circumstances, how could Louis Wolfson not remember the meeting of

October 12, 1950 and the instruction he purportedly received regarding Section 5 of the SEC Act of 1933?

Defense counsel failed to request any 3500 material and the prosecution, noting this failure, advised the Court that the only item that might fit within that category was some meaningless notes of Armstrong's. The Court accepted Armstrong's representations and no *Brady* material was proffered or discussed.

The evidentiary part of the trial of the United States against Wolfson was now concluded. All that remained was for Armstrong, by means of deception and artfulness, to put the strands together in his summation—Morley, Duncan and exhibit 21 were carefully interwoven: Morley and A.M. Kidder were scrupulously honest; they consistently tried to abide by the SEC rules; Morley advised Gerbert of the 1% rule and expressed concern to Wolfson regarding sale of control stock, proof of Wolfson's knowledge of Section 5 of the SEC Act of 1933 came from Morley's testimony of his conversations with Wolfson as well as the knowledge to be inferred from exhibit 4N (Gerbert's signature on a memo prepared by Morley concerning the sale of Gerbert's own stock); Morley's credibility is sup-

ported by the fact that Wolfson denied any knowledge of Section 5 despite his having had such knowledge imparted to him on October 12, 1950 as shown in exhibit 21; Wolfson lied when he denied knowledge of Section 5 requirements and couldn't recall the meeting of October 12, 1950—Wolfson was a target of an SEC investigation in 1950 in connection with Section 5 violations and he is trying to

get away with the same thing today that he got away with 17 years ago. Morley, Duncan and exhibit 21 were inextricably intertwined by Armstrong to prove to the satisfaction of the jury that Louis Wolfson had knowledge of Section 5 of the 1933 Act—the critical issue in this case.

It is only now with the passage of years and under the weight of truth that the strands so carefully woven by Mr. Armstrong have begun to unravel, thereby disclosing the fraud perpetrated by the prosecutor on the Court and jury that resulted in the conviction of Louis Wolfson. The full extent of this fraud only came to light with access to SEC files in *1975* under the Freedom of Information Act.[*a] In deceiving Judge Palmieri into excising certain material from exhibit 3504A (pages 87-93 of Morley's SEC testimony) and excerpting exhibit 21 from SEC files W525[*b]

[*a] These files of the SEC denominated W525 and W557 were examined by the petitioner for the first time late in 1975 at the Offices of the United States Attorney for the Southern District of New York. The *complete* files were sent to Mr. Armstrong in 1965 and he is certainly chargeable with knowledge of their contents. See exhibit F annexed hereto.

[*b] SEC W525 was an SEC investigation into Section 5 violations of the Act of 1933 by members of the "Wolfson group" (*EXCLUDING* Louis Wolfson) and certain brokers, in particular A. M. Kidder (Morley) in the sale of Capital Transit stock. The investigation commenced in September of 1950 and closed regarding the "Wolfson group" in November of 1950. No action was taken against the "Wolfson group".

and W557[*c] without making those files available to the de-

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fense, the prosecution violated both the letter and the spirit of *Brady* v. *Maryland,* (1963) 373 U.S. 83, 10 L.Ed. 2d 215, 83 Sup. Ct. 1194 and deprived Louis Wolfson of the rights guaranteed him under the Fifth Amendment.

The excised pages (87-93) of Exhibit 3504A clearly tie Morley and A. M. Kidder to an SEC investigation of Capital Transit in 1950. Capital Transit was the basic subject matter of exhibit 21 and Wolfson's meeting with Kelly and Duncan. Continental stock, the sale of which by Louis Wolfson resulted in his indictment, was a spinoff of Capital Transit. At the time Mr. Armstrong requested Judge Palmieri to excise pages 87-93 of Morley's SEC testimony under exhibit 3504A, there was no way for the Court to know the importance of these pages. When the excision was requested Judge Palmieri could not realize that these pages could have led to further discovery which in turn would have resulted in the destruction of Morley's credibility and a true understanding of Wolfson's appearance at the SEC on October 12, 1950. Armstrong's representations to Judge Palmieri at the time he made the request for excision of pages 87-93 that the excised portions do not relate to the Continental case were fraudulent in the extreme (see Tr. 465). These specific pages were in truth, sought to be excised by the prosecution for the very reason that they were of extreme relevance to the case on trial and not Merritt-

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[*c] SEC W557 was an SEC investigation as to possible violations of the 1934 Act concerning insider trading by Louis Wolfson, Capital Transit and others. The investigation commenced in March of 1952 and closed officially in August of 1957. No action was found to be necessary "because insufficient evidence was developed to show any willful violations of the 1934 Act and the rules thereunder."

Chapman. These pages would have been the key to Wolfson's acquittal.

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At the outset (as has previously been discussed in considerable detail) the excised pages 87-93 of Morley's SEC testimony under exhibit 3504A, in and of themselves show that in 1950 the SEC was investigating "Honest John Morley" and A.M. Kidder in connection with violations of Section 5 of the 1933 Act involving sale of control stock of Capital Transit. Additionally, in having Judge Palmieri excise these pages based on Armstrong's fraudulent representations that these pages had no relevance to Morley's direct testimony or to the case on trial, the prosecutor successfully prevented the defense from learning of the A. M. Kidder memorandum and its contents. The Kidder memorandum* referred to in the excised pages was of extreme relevance to any meaningful defense at Wolfson's trial on the issue of Morley's credibility (the importance of which has already been considered from the viewpoint of Armstrong's summation and Judge Palmieri's charge) which was a significant factor considered by the jury, as their note requesting that Morley's testimony be read back clearly demonstrates (Tr. 2636).

The Kidder memorandum shows without question that as a result of an SEC investigation of A.M. Kidder's (Morley's) persistent violations of Section 5 of the SEC Act of

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1933 in sales of control stock a procedure was implemented to prevent any further abuses. The memorandum, dated November 1, 1950, was an "Important Memorandum To Partners, Branch Office Managers, Registered Representatives and Department Heads." John Morley certainly re-

* See exhibit B annexed hereto.

ceived this memorandum. Indeed, as documents (W525) obtained from the SEC in 1975 under the Freedom of Information Act disclose, it was Morley's sales of control stock of Capital Transit for members of the "Wolfson group" (*NOT* including Louis Wolfson who had made no sales) that created the problem for Morley and Kidder in 1950. Notwithstanding his receipt of the Kidder memorandum, Morley's own testimony at trial reveals that he never followed the procedures set forth in determining *who* is a member of a control group and how those sales *must* be handled.*a Had Morley, in fact, been "honest" and "scrupulous" he could not have violated Section 5 requirements in the sale of Continental stock which violations he endeavored to excuse. If the defense had use of the Kidder memorandum at the time of Morley's testimony, he would have been unmasked and shown to be the liar that he was. The defense could have shown that Morley's firm violated the 1% rule consistently and that Morley's excuses had no validity for his *admitted* violations of the 1% rule.*b

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Morley's expressed confusion as to how certain trades in violation of the 1% rule occurred

> ". . . I am very, very puzzled that these trades got through. I don't know how they did." (Tr. 488)

his self-made exceptions in exercising due diligence concerning possible sales of control stock for sellers of small quantities

> "Q. [by Gould of Morley] In other words, your practical application of Rule 154, as a practical matter,

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*a See Kidder memorandum—Exhibit B annexed hereto.

*b Kidder (Morley) admittedly violated the 1% rule in a number of occasions in 1954, 1955, 1958, 1960 and 1961.

you distinguished between controlling persons who are big operators and the ones who were little operators, correct? (Tr. 497)

. . .

"Q. This was a practical exception that you made yourself, is that right, between the big operators and little operators?

"A. Yes, sir." (Tr. 498)

his definition of due diligence as not requiring inquiry of a control person whether he had sold through other brokers.

"Q. Didn't you ask him [Louis Wolfson] whether he sold it through other brokers?

"A. No, sir.

. . .

"A. That was due diligence if I asked him if he had not sold with us, we could not police his actions in other brokers (Tr. 507, 508)

. . .

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"Q. You didn't check whether any other members of the control group were also selling at the time?

"A. That would not be necessary. (Tr. 509).

. . .

"Q. Didn't you assume the possibility that he [Gerbert in 1961] might have sold stock through some other broker?

"A. No, sir.

"Q. Why not?

"A. A broker is not required when accepting an order from a customer to ask him if he sold stock through another broker."

"Q. You mean that wasn't part of your check, right?

"A. That's right. You don't have to ask. 'Did you sell anywhere else?'" (Tr. 522, 523).

his self-created exceptions regarding who was in the control group

"Q. Well, now, when Mrs. Edwards [a sister of Louis Wolfson] sold Continental stock you didn't raise any question about it.

"A. . . . I wrote a memo to the New York office and I said Edith Edwards is a widow, five children and she should be permitted to sell this, and I am not so sure that she should be within the control group, and they may have removed her on the basis of that request from me, and that was the result of that oversale at the particular time in New York. (Tr. 542)

all would have been shown to be of no validity in the context of the November 1, 1950 Kidder memorandum. Morley would have been exposed for the liar he was, as one who consistently violated the rules governing sale of control

stock without any valid explanation. The Kidder memorandum *explicitly* directed Morley to inquire of a person in the control group: "how many shares has he previously sold in the past few months through our firm *and other firms*?" and "how many shares does he intend to sell in the next few months either through our firm and other firms?" (see exhibit B annexed hereto). A relative or associate of a control person was also deemed to be in control for purposes of selling his stock. The procedures and warnings of the Kidder memorandum were ignored by Morley because he was, in point of fact, "*dis*honest" and "*un*scrupu-

lous". Morley was not going to refuse sales or warn customers of SEC rules that would prevent those sales since to do so would deprive Morley of substantial income.

It is of paramount importance at this juncture to note once again that what is at issue here and "the only reason the proof as to Kidder's sales prior to 1960 was permitted was [as Judge Palmieri charged] to test the credibility of Mr. Morley" (Tr. 2564). Morley's credibility was juxtaposed against that of Wolfson. Did Morley inform Wolfson of Section 5 requirements concerning sale of control stock as Morley claimed? As Judge Palmieri noted in his charge to the jury

> You have to decide—it is going to be one of the important responsibilities you will have in this case, to decide whether you believe Morley on the one hand or whether you believe . . . Wolfson on the other hand,
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>
> because depending upon which one of these witnesses you believe it will take you a considerable way on the road to deciding the controverted issues in this case. (Tr. 2556).

Morley's testimony was relevant solely to the question of Wolfson's knowledge of Section 5 requirements. It is important to realize that *NONE* of the sales of control stock of Continental that comprise the nineteen counts of the indictment were made by Kidder and Morley. Moreover, the testimony of the brokers who made the sales that were set forth in the indictment could not provide the prosecution with any evidence that Wolfson had knowledge of Section 5 and Rule 154. Indeed, the degree of familiarity the brokers themselves had with these rules and regulations of the SEC Act of 1933 was questionable. Armstrong

needed Morley to provide evidence of Wolfson's knowledge and Morley had to be believed. If Morley were to be confronted with the information in the Kidder memorandum he could not have attributed his own sales that violated the 1% rule to excusable error. Additionally, exposure of the Kidder memorandum by the prosecutor would run the risk of opening a Pandora's box. The pernicious decision was made and the Kidder memorandum was willfully suppressed. With the governmental suppression of pages 87-93 of Morley's 1965 SEC testimony and the suppression of the Kidder memorandum the ineluctability of Wolfson's conviction was almost assured.

Of added interest regarding the prosecutor's impermissible and willfull suppression of exculpatory evidence are

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the revelations contained in the deposition of Anthony M. Englese. *This deposition was taken on September 10, 1976 in a separate but related civil suit and consequently was not referred to in any other proceeding relating to Wolfson's 1976 conviction.* As revealed herein, Mr. Englese, beginning in February of 1960, was house counsel and director of compliance for Reynolds & Co., a stock brokerage house that became a successor in interest to certain offices and accounts of A. M. Kidder in 1963, in particular the Jacksonville office and the Wolfson accounts through Morley. A number of questions were propounded to Englese concerning Morley's appearance before the SEC in 1965 and his subsequent meeting with Armstrong. Englese "represented" Morley at the time of those appearances, without a fee and not as his person counsel, but with a view to protecting the interests of his employer Reynolds.

"Q. [By Roy M. Cohn, Esq.] In what capacity did you appear for Morley at the SEC hearings; as his

personal counsel or by virtue of your position as Director of Compliance for Reynolds or both?

"A. My recollection is that I appeared really as director of compliance of Reynolds but in the guise of his counsel I would have been permitted to attend the meeting." *

Although Englese, on instruction of counsel, refused to answer most of the questions and claimed that he was unable to recall the specifics of the events about which he was being questioned, Englese did acknowledge that there were certain inaccuracies in Morley's testimony before the SEC

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in 1965, that Morley consulted Englese about these inaccuracies and that on advice of Englese, they were corrected by Morley at the time of Morley's meeting with Armstrong a second time.

Q. [By Mr. Cohn] How did you learn that?

A. [Of Mr. Englese] On the occasion of Mr. Morley's first appearance before Mr. Armstrong, shortly thereafter, Mr. Morley told me that he had made an inaccurate statement, sought my advice to a certain extent and I understand that he changed that inaccurate statement before Mr. Armstrong.

Q. Did you advise him to change it?

A. Yes. (pp. 50-51 of deposition)

In view of the instances of prosecutorial impropriety that have already been demonstrated regarding the willful suppression of exculpatory evidence, one has serious reason

* See Exhibit G annexed hereto.

to conjecture as to the nature of the bargain struck between Armstrong on the one hand and Morley and Reynolds on the other. Why were none of the Kidder sales in violation of the 1% rule reflected in the indictment of Wolfson? What understandings were reached betwen Armstrong and his key prosecution witness? What was the *quid pro quo?* What were the "inaccuracies" that Morley corrected at a second meeting with Armstrong and how did he explain them? Did Morley offer up Louis Wolfson in exchange for the insulation of Reynolds and his own immunity from prosecution for perjury? It is suggested that absent an evidentiary hearing where these questions would be pro-

bative of Armstrong's motives and intent in suppression of other exculpatory evidence these questions may not be resolved. It is suggested, however, that some insight might be found from the contents of Armstrong's notes of his meeting with Morley which are contained in exhibits 3504B (notes of Armstrong's meeting with Morley on August 2, 1966-6 pages) and 3504C (notes of Armstrong's meeting with Morley on April 27, 1967). Therefore, it is requested that the contents of these notes which have heretofore been sealed now be made available to the defense or, in the alternative, that this Court examine them *in camera.*

The Kidder memo was of further consequence in that its revelation would have been the means by which disclosure of SEC files W525 and W557 would have come about during the trial. The prosecution in an all-out effort to convict Wolfson was determined to do all that was necessary to prevent this disclosure.

However, with passage of the Freedom of Information Act as amended in 1974, an event that the prosecutor Mr. Armstrong could not have presaged 8 years earlier, SEC

files W525 and W557 finally became available to the defendant. The true nature of Wolfson's appearance at the SEC on October 12, 1950 and the import of that meeting could now be seen in proper perspective. The fraud committed by Armstrong in depicting Louis Wolfson as the target of a 1950 SEC investigation into violations of Section 5 of the 1933 Act is readily apparent. In point of

fact, SEC W525 which purported to be an investigation by the SEC of violations of Section 5 of the Act of 1933 involving sales of Capital Transit stock by members of the "Wolfson group" (*NOT* including Louis Wolfson) was an outgrowth and incidental to an SEC investigation into possible manipulation in violation of the Act of 1934.[*a] On September 28, 1950 a letter from E. Russel Kelly the Regional Administrator of the SEC in Washington, D.C.[*b] (*THE AUTHOR OF EXHIBIT 21*) was sent to William Green the Regional Administrator of the SEC in Atlanta, Georgia which explained he background and nature of the SEC investigation of Capital Transit that was ordered on September 20, 1950. The *essence* of the SEC investigation into Capital Transit involved VIOLATIONS OF THE ACT OF 1934. The SEC order authorizing an investigation under Section 5 of the Act of 1933 was merely a vehicle to allow the SEC to conduct an investigation into possible violation of the anti-manipulation sections of the 1934 Act. (see exhibit J annexed hereto). The pertinent paragraphs of the letter of September 28, 1950 state:

> The Division of Trading and Exchanges is presently conducting an inquiry to determine whether or not

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[*a] See exhibits H(i)(ii) annexed hereto.

[*b] See exhibit I annexed hereto.

there has been any violation of the anti-manipulative sections of the Securities Exchange Act of 1934. The price of this stock advanced from $23.00 a share in January, 1950, to approximately $39.75 a share in August, 1950.

The matter was presented to the Commission on September 20, 1950 and the Commission adopted an order directing an investigation to determine whether

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the provisions of Section 5(a) of the Securities Act of 1933 have been violated by the controlling group in selling the stock to the public. *The question of apparent manipulation was presented to the Commission but there was an absence of any clear proof of manipulation and the Commission determined that an order under Section 5(a), which admittedly has been violated [NOT by Louis Wolfson since he had not made any sales], would enable us to determine sufficient facts to disclose any possible violation of the antimanipulation sections of the 1934 Act. (Emphasis added).* See p. 4 of Exhibit I annexed hereto).

The remainder of the letter goes on to disclose various aspects and suggestions relating to the investigation that was to be conducted into the anti-manipulative sections of the 1934 Act.

It is the transactions which raised the price from 23½ in January to the price at which members of the controlling group distributed their holdings which particularly interest us. The buying centered in Jacksonville and Orlando, Florida, with the *IMPORTANT EXCEPTION OF SOL MONSKY* of Montgomery,

Alabama, and even he appears to have a Jacksonville connection. (Emphasis added). See p. 5 of Exhibit I.

The order of September 20, 1950[*a] which directed an investigation into possible violations of Section 5(a) of the Act of 1933 lists as its targets: "Sam W. Wolfson, Saul Wolfson, J.A.B. Broadwater, Doran S. Weinstein, Jack Surasky, E. B. Gerbert and W.Y.G.S. Venture (see p. 2 of exhibit J) [the Venture was composed of the following persons, Ben Stein, Ben Yoffee, Lewis M. Schott, Jack Surasky, Doran S. Weinstein, Sam W. Wolfson, Saul Wolfson, Cecil Wolfson, and E.B. Gerbert].[*b] LOUIS

WOLFSON WAS NOT A TARGET OF THE 1950 SEC INVESTIGATION (W525) INTO SECTION 5 VIOLATIONS, since he had made no sales. Documentary evidence contained in SEC W525 (the source of exhibit 21 and Duncan's testimony as well as the hiding place of the Kidder memorandum) proves unequivocally that at the time of Louis Wolfson's voluntary appearance with Doran Weinstein at the SEC on October 12, 1950 the SEC investigation into unregistered sales of control stock of Capital Transit by the specific above-named persons also centered on the conduct of two specified stock brokers—Thomson & McKinnon and *A. M. Kidder* (as a result of sales by Morley). Once again it is important to note that at the time when Louis Wolfson accompanied by Weinstein met with Kelly and Duncan the SEC already had all the information relating to Section 5(a) violations of the 1933 Act and that the true tenor of the investigation that

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[*a] See exhibit J annexed hereto.

[*b] See exhibit K annexed hereto.

was being conducted under the guise of a Section 5(a) investigation was an investigation into possible violation of the 1934 Act involving manipulation.

Thus, when Weinstein and Louis Wolfson appeared together at the SEC offices on October 12, 1950, their interests and concerns in meeting with Duncan and Kelly lay in entirely different areas. Weinstein's essential concern related to Section 5 of the 1933 Act and, to that end, as documents from SEC W525 illustrate, Weinstein on October 23, 1950 met and conferred, *on his own*, with SEC officials as a followup to his initial meeting of October 12,

1950. Weinstein was concerned with the requirements of Section 5 since he was desirous of selling stock of Capital Transit in view of the fact that he was in the Naval Reserves and might be called up to active service as a result of the international situation as of October of 1950. The matter was finally resolved by a private sale to U.S. Wolfson Brothers Corporation which did not require the filing of a registration statement.[**a] Wolfson meanwhile was solely concerned about the consequences that might befall Capital because of rumors that had been circulating regarding stock manipulation.

On October 16, 1950, the *very day that Kelly prepared exhibit 21*, Kelly sent a letter to William Green, Regional Administrator of the SEC in Atlanta, Georgia wherein Kelly enclosed a copy of exhibit 21. Kelly explains to Green that

> I think that you will be interested in this memorandum, *PARTICULARLY SINCE THE OCCASION*

[**a] See exhibits L(i), L(ii), and L(iii) annexed hereto.

FOR THE CONFERENCE WAS MR. NICHOLS' MEETING WITH MR. MONSKY.[*b]

Mr. Monsky as noted in the letter of Kelly to Green of September 28, 1950 (annexed hereto as exhibit I) was one of those to be interviewed regarding MANIPULATION.

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Louis Wolfson's meeting with Duncan and Kelly on October 12, 1950 resulted from the SEC interview of Monsky and its inquiry into the question of manipulation—not registration. When these various interviews regarding the issue of possible *manipulation violations* of the Act of 1934 were concluded Kelly was prepared to go before the Commission with recommendations to close-out SEC W525.[*a]

It is important once again to take cognizance of the fact that Wolfson's trial testimony occurred 17 years after his SEC meeting on October 12, 1950 and, without having an opportunity to look at exhibit 21[*b] prior to being questioned about this meeting. It is fully understandable that Wolfson would not remember the meeting in the context of Armstrong's questioning relating that meeting to Section 5 violations of the 1933 Act. Armstrong having had complete access to SEC W525 and W557 could fully appreciate and understand Wolfson's inability to recall the October 12th meeting in the context of Section 5. Having gained the "tactical" advantage by fraudulent representations to the Court and violation of *Brady*, Armstrong made full use of it.

[*b] See exhibit M annexed hereto.

[*a] See exhibit N annexed hereto.

[*b] Duncan met three times to read over exhibit 21, the third time being the day before he testified (Tr. 2263).

If Wolfson had access to the documents in SEC W525 at the time of his trial as he was entitled to under the Fifth Amendment and the holding of *Brady* v. *Maryland, supra,* an entirely different picture would have been shown

to the jury. Wolfson would have not suffered the stigma fraudulently imposed on him by the prosecutor, Mr. Armstrong of being one who had been the target of an SEC investigation into violations of Section 5 of the 1933 Act in 1950—the very same type of violation that was the basis for his indictment. The meeting of October 12, 1950 would have been seen in its true light as far as its import to Wolfson and the knowledge he was supposed to have gained from that meeting regarding registration requirements. Indeed one well might conjecture in passing, based upon disclosure of documents from SEC W525, whether Kelly's recollections of the October 12th meeting at the time of the memo of October 16th might have caused him inaccurately or erroneously to attribute certain conversation to Wolfson relating to Section 5.

SEC W525 "closing documents" give further insight into the October 12th meeting, the character of Louis Wolfson and the scrupulousness of A.M. Kidder and John Morley. A six-page memorandum report of November 14, 1950 from Kelly** once again chronicles the history of SEC W525. Under the guise of an investigation of Section 5 violations that had already been established, an investigation of possible Section 9(a)(2) violations under the Act of 1934 was conducted. This evidence was not able to establish evidence to indicate that the market in Capital stock had been manipulated. (See p. 4 of exhibit 0). Moreover, based upon the investigation Kelly stated that

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** See exhibit O annexed hereto.

> From these interviews one fact becomes apparent. That is that Mr. Louis Wolfson is highly regarded, particularly in Florida. (See page 4 of exhibit O).

As regards violations of Section 5 of the Act of 1933, Kellys memorandum states that Louis Wolfson was *NOT* one of those involved.

> Louis Wolfson, who is the admitted leader of the group, has not offered or sold so far as the record discloses any of his shares of the stock. (See page 5 of exhibit O).

SEC W525 documents are important in a further regard. While the investigation against members of the "Wolfson group" (which did *not* include Louis Wolfson) for Section 5 violations was closed on November 14, 1950 without any formal action by the SEC deemed necessary, the file remained open against A.M. Kidder (It must again be emphasized that Kidder's numerous violations were based upon sales of "Wolfson control group" stock of Capital Transit by John Morley). It was the decision of the staff that letters of censure should be addressed to three of the brokers including A. M. Kidder.*a A letter of "formal censure" was sent to A.M. Kidder*b and SEC W525 was formally closed on April 18, 1951.*c

There is no question that the truth contained in SEC W525 which Armstrong deliberately suppressed would

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*a See exhibit P annexed hereto.

*b See exhibit Q annexed hereto.

*c See exhibit R annexed hereto.

have prevented the prosecutor from fraudulently and misleadingly telling the jury that Wolfson is trying to get away with the same thing he did in 1950, that Wolfson's testimony was

> the echo of 17 years ago, the attempt of a man to put over on this jury the kind of representation that he succeeded in putting over back in 1950 (Tr. 2494).

Before commencing a discussion of the legal issues involved herein some mention must be made of the knowledge to be gleaned from SEC W557. This file dealt with an investigation by the SEC of possible violations of the *1934* Act dealing with insider trading. This investigation formally commenced on March 4, 1952, long after the close of SEC W525 and had nothing to do with Section 5 violations of the 1933 Act.*a It was in connection with the SEC investigation designated W557 that Wolfson appeared with his attorneys, gave a deposition on April 10, 1952*b and met with Duncan on a second occasion. Moreover, the closing report of SEC W557 dated November 17, 1955 stated that there was no action to be taken because there was no showing of wrongfulness of Wolfson's part.*c The prosecutor Mr. Armstrong was aware of these facts at the time of his cross examination of Louis Wolfson and when Duncan was called as a rebuttal witness. However, Armstrong allowed the confusion caused by the passage of

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*a See exhibit S annexed hereto.

*b This deposition was never produced by the prosecution nor was it turned over under the Freedom of Information Act.

*c See exhibit T annexed hereto.

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years to work to his full advantage. To that end (as has been fully expatiated and circumstantiated heretofore) Armstrong deliberately left the jury with the false impression from the questioning of Wolfson and Duncan that Wolfson appeared with his attorneys, gave a deposition and met with Duncan twice in 1950 in connection with an SEC investigation involving violations of Section 5 of the SEC Act of 1933, whereas, in truth and in fact, Wolfson *NEVER* met with Duncan concerning Wolfson's violation of Section 5 since Wolfson had no such violation and the only SEC deposition of Louis Wolfson occurred in 1952 in connection with SEC W557. The SEC files (W525 and W557) categorically refute the fallacious inference of Armstrong's questioning of Duncan, cross-examination of Wolfson and the introduction of exhibit 21, as well as the deceitful argument of Armstrong to the jury that in 1950 Wolfson had been involved in an SEC investigation into violations of the SEC Act of 1933 relating to sale of control stock.

The fraud and deceit practiced by the prosecutor upon the Court and the defendant was subtle but this very subtlety makes it all the more pernicious. It is the very nature of this kind of fraud that has caused prior counsel to accuse the Trial Court of impropriety. It is only after the most careful scrutiny that the evil hidden among thousands of pages of trial testimony and SEC documents can be found and seen for what it is.

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While it is the essence of defendant's petition that the suppression by the prosecution of exculpatory documents and evidence critical to the defense was violative of *Brady*

and its progeny, some brief mention of the 3500 rule is necessary. This necessity is engendered by the fact that it was Mr. Armstrong's fraudulent representations to Judge Palmieri during the colloquy concerning 3504A that enabled the prosecutor to suppress the exculpatory evidence found in pages 87-93 of Morley's 1965 SEC testimony and the contents of SEC W525 (including *inter alia* the Kidder memorandum) and SEC W557.

Under 18 U.S.C. §3500(e)(2) the government is required to turn over to the defense "a stenographic, mechanical . . . or a transcription thereof, which is a substantially verbatim report of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement" when such statement relates to the *subject matter* of the witness' direct testimony. Where, as in the instant matter, the Government contends that portions of the statement of a witness are not relevant, the trial court is required to inspect the statement *in camera* and excise the portions that are supposedly unrelated before delivery to the defendant. §18 U.S.C. 3500(c). Moreover, the cases have held, that under this provision, the court may not decline to give the defendant the statement solely on the prosecutor's assertion that it is not related to the direct

testimony. *United States* v. *O'Brien*, 444 F.2d 1082, 1085-86 (7th Cir. 1971); *United States* v. *Covello*, 410 F.2d 536, 546 (2d Cir.), *cert. denied*, 396 U.S. 879 (1969); *United States* v. *Nasta*, 398 F.2d 283 (2d Cir. 1968). However, within this rule it is also recognized that the Government could direct the court's attention to those portions of the 3500 material that are unrelated to the witness' testimony. *United States* v. *Holmes*, 284 F.2d 716, 720 (4th Cir. 1960).

In the instant matter it is clear that the trial court's understandable lack of familiarity with the totality of circumstances surrounding the case on trial was relied upon by the prosecutor in having pages 87-93 of Morley's 1965 excised (especially where Mr. Armstrong made specific representations that such testimony was irrelevant to the case on trial). The legal standard to be applied in determining whether a new trial must be granted the defendant where, as here, the prosecution fails to turn over 3500 material is dependent upon whether such suppression was deliberate or inadvertent. If the Government's suppression of evidence was deliberate or ignores evidence of such significance that it could not have eluded the prosecutor's attention, a new trial is mandated, even if this evidence is merely material or favorable to the defendant. If the Government's failure to reveal the 3500 material is inadvertent, a new trial is mandated only where there is a significant chance that this material, as used by skilled defense counsel, could have raised a reasonable

doubt among the jurors to avoid a conviction. *United States* v. *Hilton*, 521 F.2d 164, 166 (2nd Cir. 1975); *United States* v. *Miller*, 411 F.2d 825 (2nd Cir. 1969). The standards applicable to 3500 material in the Second Circuit are much the same as those that require a new trial, or hearing, under *Brady* and for this reason it is clear that, whatever touchstone is applied, a new trial or minimally an evidentiary hearing, must be granted.

Even prior to the decision of the Supreme Court in *Brady* v. *Maryland, supra*, the Second Circuit expressed concern where convictions resulted from governmental suppression of evidence that might prevent the defense

from producing evidence that could create a reasonable doubt. Thus, in *United States* v. *Zborowski,* 271 F.2d 661 (2nd Cir. 1961), the defendant's perjury conviction was reversed and remanded for a new trial where the trial court sustained the prosecutor's refusal to turn over grand jury testimony of a key government witness and subsequent examination of such testimony disclosed a number of inconsistencies with the witness' testimony at trial. Various factors raised by the Second Circuit are analogous to the present petition and for that reason merit brief mention. The Second Circuit pointed that although there was much other data that could be used to impeach the witness this, in and of itself, does not excuse the failure of the prosecution to turn over grand jury minutes which contained statements inconsistent with trial testimony. The court recognized that the fact that the prior testimony was under oath gave it a special importance and further that, even if the grand jury evidence was merely

cumulative for impeachment purposes, the defendant should have been able to use it to whatever extent he might wish. Indeed the Court held that the prosecutor had a duty to point out to the trial judge the inconsistencies in the suppressed grand jury testimony when the trial judge refused to read those minutes. The Court stated that a prosecutor is held to a high standard:

> The prosecutor must be vigilant to see to it that full disclosure is made at trial of whatever may be in his possession which bears in any material degree on the charge for which a defendant is tried. In the long run it is more important that the government disclose the truth so that justice may be done than that some

advantage might accrue to the prosecution toward ensuing a conviction. 271 F.2d 661, 668.

The Second Circuit had further opportunity to consider the problem of governmental suppression of material that would have been helpful to the defendants on certain points which the court found to have been important in deciding their guilt in *United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563 (2nd Cir. 1961). In reversing the defendant's non-jury conviction before the Hon. Edmund Palmieri and remanding for a new trial, the Second Circuit dealt with the question of negligent suppression of material after acknowledging in a footnote that had the suppression been willful the defendants would clearly have been entitled to relief even if the suppressed testimony went only to the credibility of the witness (citing *Napue* v. *Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed. 2d 1217 (1959). The court held that "the correct administration of criminal justice in the federal courts" (291 F.2d

at 571) required a reversal and remand for a new trial because of "the negligent suppression of material evidence by the Government" (*ibid*). See also, *Kyle* v. *United States*, 297 F.2d 507 (2nd Cir. 1961).

Finally, in 1963 the Supreme Court again dealt with the issue of prosecutorial suppression of evidence favorable to the accused. Thus, in *Brady* v. *Maryland, supra*, the Supreme Court held that the suppression by the prosecution of evidence favorable to a defendant violates due process where such evidence is material to guilf or punishment without regard to the prosecutor's good or bad faith. The duty of disclosure under *Brady* not only applies to the prosecutor but also includes persons such as Stuart

Allen of the SEC (who assisted Armstrong throughout preparation of the case and sat at the prosecution table during the course of the trial) working as part of the prosecution team or intimately connected with the Government's case. See *United States* v. *Morell,* 524 F.2d 550 (2nd Cir. 1975). There are two general categories of material that are encompassed by *Brady:* (a) material which tends to be exculpatory, *United States* v. *Poole,* 379 F.2d 645 (7th Cir. 1967); *United States* v. *Agurs,* 96 S. Ct. 2393 (1976), and (b) material that may be used by the defense to impeach or discredit government witnesses. *Levin* v. *Katzenbach,* 124 App. D.C. 158, 363 F.2d 287 (1965); *Coleman* v. *Maxwell,* 273 F. Supp. 275 (1967 D.C. Ohio), aff'd 399 F.2d 662 (6th Cir. 1968), cert. den. 393 U.S. 1058, 21 L. Ed. 2d 700, 89 S.Ct. 699 (1969); *United States* v. *Keogh,* 417 F.2d

885 (2nd Cir. 1969); *United States* v. *Morell,* 524 F.2d 550 (2nd Cir. 1975). In determining what material comes within the ambit of *Brady* and its progeny, consideration must also be given to (a) the conduct of the prosecutor, (b) the prejudicial impact on the defendant's case, and (c) the probable effect the material would have had on the outcome of the trial. *United States* v. *Keogh,* 391 F.2d 138 (2nd Cir. 1968); *United States* v. *Morell,* 524 F.2d 550 (2nd Cir. 1975); *United States* v. *Agurs,* 96 S. Ct. 2392 (1976).

In light of the expatiation already set forth regarding the material which the prosecutor, Mr. Armstrong, caused to be suppressed, the nature and import of such material shall here be dealt with in summary form. Defendant contends that, since the key element in establishing his guilt or innocence was that of scienter, i.e. his knowledge of the requirement of Section 5 concerning registration, much of the material suppressed was exculpatory in nature. The

disclosure of pertinent documents SEC 525 and 557 could have been used by defense counsel to rebut the false impression created by the prosecutor through Duncan's testimony, exhibit 21 and the cross-examination of Louis Wolfson that on October 12, 1950 Wolfson was instructed on Section 5 of the 1933 Act in a manner that he could never forget. At the same time it is beyond peradventure that disclosure of the excised pages of Morley's SEC testimony and pertinent portions of SEC W525 (especially the Kidder Memorandum) would have enabled defense counsel to show Morley as being totally lacking in credibility. Morley's failure to adhere to the procedures set forth in the Kidder

memorandum, his deliberate course of conduct in violating the 1% rule, his evasiveness and spurious explanations whereby he sought to justify his course of improper conduct would have stripped Morley of the "Honest John" image created by Mr. Armstrong sleight of hand and allowed the jury to see through the illusion. Morley would have been seen for the liar he is. If, as Armstrong emphasized in his summation and Judge Palmieri stated in his charge, the verdict of the jury largely depended upon whether they believed Morley or Wolfson, there can be no question that disclosure of the suppressed material would have compelled a verdict of acquittal.

Having discussed the type of material that was required to be turned over to the defendant under *Brady*, it is necessary to consider the effect of such nondisclosure. In *United States* v. *Keogh*, 391 F.2d 138, 146-48 (2nd Cir. 1968), the Second Circuit held that the standard for evaluating the effect of non-disclosure of exculpatory evidence varied with the nature of the conduct of the prosecution that led to the nondisclosure. *Keogh* was an appeal from

an order of the District Court for the Southern District denying a petition for a writ of error *coram nobis* without an evidentiary hearing. The Court of Appeals held that the issue raised by the writ dealing with the failure of the government to turn over to the defendant certain FBI reports even though such reports had not been requested by defense counsel required an evidentiary hearing to decide whether this nondisclosure was of sufficient seriousness in its *motivations* or *consequences* to warrant the granting of the writ of error *coram nobis.*

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At the outset the Court in *Keogh* recognized that the suppressed material could have been used by defense counsel in such a manner as to affect significantly the defendant's trial strategy. Aside from being useful for purposes of attacking the credibility of an important prosecution witness the knowledge gained from undisclosed information could have led defense counsel to other information that might also be useful to skilled defense counsel. The Court of Appeals in resolving *Keogh* was dealing with the category of cases "where suppression was not deliberate . . . and no request was made, but where hindsight discloses that the defense could have put the evidence to not insignificant use." 391 F.2d at 147. This type of situation requires a showing of a considerably higher standard of materiality in order to obtain relief that "[t]he easy cases . . . where the prosecutor's suppression is "deliberate," by which [is meant] not merely a considered decision to suppress, taken for the very purpose of obstructing, but also a failure to disclose evidence whose high value to the defense could not have escaped the prosecutor's attention." *ibid* at 146, 147. The Court thusly distinguished between cases of deliberate prosecutorial suppression which require

a fairly low showing of materiality and those cases of inadvertent suppression arising out of a "[f]ailure to appreciate the use to which the defense could place evidence in the prosecution's hands, or forgetfulness that it exists when a development in the trial has given it a new impor-

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tance," *ibid* at 148, where a greater showing of materiality is required. Finally, the Court found further that the standard of materiality must be shown by a defendant who claims to have been damaged by negligent nondisclosure is relatively high when the issue is raised in a *coram nobis* petition.

The Second Circuit remanded the matter for an evidentiary hearing since the record before them did not provide sufficient information to decide the case under either of the standards delineated. It was anticipated that such hearing would determine the nature of the nondisclosure (whether willful or negligent) and the possible usefulness (materiality) of the undisclosed evidence to the defense.

The different standards to be applied were more recently summarized by the Second Circuit in *United States* v. *Morell*, 524 F.2d 550, 553 (2nd Cir. 1975). Upon remanding the matter for purposes of holding an evidentiary hearing to determine whether the prosecution's failure to disclose a confidential file on the Government's key witness was deliberate or negligent, the Court of Appeals stated:

> The standards governing the grant of a new trial vary according to the extent of the government's cupability. If the prosecutor has intentionally suppressed evidence or ignored evidence whose high value to the defense could not have escaped his attention, a new trial is warranted if the evidence is merely material

or favorable to the defense. E.g. *United States* v. *Kahn*, 472 F.2d 272, 287 (2nd Cir.) cert. denied, 411 U.S. 982, 93 S.Ct. 2270, 36 L.Ed2d 958 (1972); *United States* v. *Keogh*, 391 F.2d 138, 146-47 (2nd Cir. 1968), If, on the other hand, the government's failure to disclose is merely inadvertent • • •

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false and fraudulent impression regarding Wolfson's knowledge of Section 5, his being a target of an SEC investigation in 1950 for the same kind of violations as charged in the indictment and his credibility vis-à-vis John Morley. As the Supreme Court stated in *United States* v. *Agurs*, 96 S.Ct. 2392, 2401 (1976):

> Though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest "that justice shall be done." He is the "servant of the law, the twofold aim of which is that guilt shall not escape or innocent suffer." *Berger* v. *United States*, 295 U.S. 78, 88 55 S.Ct. 629, 633, 79 L.Ed. 1314. This description of the prosecutor's duty illuminates the standard of materiality that governs his obligation to disclose exculpatory evidence.

The materiality standard of *Agurs* echoes Canon 5 of the American Bar Association Canons of Professional Ethics where, in recognition of the possible unfairness that may arise in the criminal justice system as a result of the prosecutor's superior resources and special access to information and witnesses, it is stated that: "the primary duty of

a lawyer engaged in public prosecution is not to convict but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing innocence of the accused is highly reprehensible."

Assuming arguendo that Armstrong's nondisclosure was inadvertent, the higher standard of materiality that would have to be met has still been satisfied. There can be no question that given the emphasis which Armstrong, the Court and the Jury (as seen from their request to have Morley's testimony re-read which was previously referred)

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placed on Morley's credibility, access to the excised pages (87-93 of 3504A) when coupled with the Kidder memorandum would have required any juror to find a reasonable doubt. The significance of documents contained in government files SEC W525 and W557 has also been amply proven.

It must be noted in conclusion that under the circumstances of this case, the fraud and deception practiced by the prosecutor upon the defendant Wolfson (whose Constitutional mantle of innocence was unjustly stripped from him) and upon the trial judge (whose dignity of office was thereby impugned) mandates reversal or at the very minimum the holding of an evidentiary hearing as described in *Keogh* and *Morell*. The dank, malodorous air that envelopes the conviction of Louis E. Wolfson must be cleared. The responsibility for removing that which presently befouls the halls of criminal justice now lies with this Court. In facing this difficult, yet most important task of reversing the unjust conviction of Louis Wolfson eleven years ago, and in understanding that which has motivated Wolfson in his quest the words of Daniel Webster are particularly appropriate:

Justice, sir, is the greatest interest of man on earth. It is the ligament which hold civilized beings and civilized nations together. Wherever her temple stands, and so long as it is duly honored, there is a foundation for social security, general happiness, and the improvement and progress of our race. And whoever labors on this edifice, with usefulness and distinction, whoever clears its foundations, strengthens its pillars, adorns its entablatures, or contributes to raise its august dome still higher in the skies, connects himself in name, and fame, and character, with that which is and must be as durable as the frame of human society. *Life and letters of Joseph Story* (William W. Story, ed., Boston: Charles C. Little and James Brown, 1851), Volume II, p. 624.

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ARGUMENT

The Government's Knowing and Deliberate Intrusion Into the Attorney-Client Relationship Under the Circumstances of This Case Deprived Louis Wolfson of His Sixth Amendment Rights and Mandates the Granting of an Evidentiary Hearing.

a. *General Principles*

The Sixth Amendment to the United States Constitution provides in pertinent part that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." Clearly "Assistance of Counsel" has no meaning unless such "Assistance" is effective assistance. In further refining the meaning of what constitutes effective assistance of counsel it is beyond peradventure that disloyalty or conflict of interest on the part of an attorney deprives the client of the mantle af-

forded by the Sixth Amendment. Effective assistance of counsel requires nothing less than the undivided loyalty of counsel to his client. *United States ex rel. Platts* v. *Myers,* 253 F.Supp. 23 (D. Pa. 1966); *Atilus* v. *United States,* 406 F.2d 694 (5th Cir. 1969). When the loyalty of the attorney to his client is subverted by deliberate intrusion of the Government in an all-out effort to succeed in a criminal prosecution of the client such disloyalty is so substantial as to befoul the entire proceeding and deny the client of due process, *United States* v. *Wight,* 176 F.2d 376 (2nd Cir. 1949), *United States ex rel. Cooper* v. *Reincke,* 333 F.2d 608 (2nd Cir. 1964), and his Sixth Amendment rights. *Glasser* v. *United States,* 315 U.S. 60, 70 (1942),

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United States v. *DeCoster,* 487 F.2d 197, 1203 (D.C. Cir. 1973).

b. *Background*

The *Continental* case was an extremely complicated one from both a legal and factual standpoint. The 19 count indictment against Louis Wolfson covered past sales of over-the-counter stock through a number of brokers and involved the basic charge that Louis Wolfson, as a controlling shareholder, *knowingly* sold securities without filing a required registration statement in violation of Section 5 of the Securities Act of 1933, 15 U.S.C. §77(e). The indicement was filed on September 19, 1966.

Mr. Wolfson's defense was placed in the hands of Milton Gould, Esq. Mr. Gould received assistance and worked closely with Mr. Joseph M. Glickstein, Sr., who had been petitioner's personal attorney for many years, and who also was general counsel to many of the firms in which Mr. Wolfson had an interest, including Continental Enterprises.

c. *Sixth Amendment Claims*

Placed against this backdrop the defendant, Louis Wolfson's argument that he was deprived of his Sixth Amendment rights arises out of two situations; firstly the appearance of Glickstein before the very grand jury that indicted Wolfson without Wolfson's foreknowledge and approval, and secondly, Gould's representation of Wolfson occurred at a time when Gould himself was the target of a criminal investigation involving an S.E.C. matter.

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1. *Glickstein's Grand Jury Appearance*

Following Mr. Gould's assumption of the role of lead counsel to Mr. Wolfson during the time when Mr. Wolfson was the subject of governmental investigation and after the convening of the grand jury that subsequently indicted Mr. Wolfson, the prosecutor, Mr. Armstrong, threatened Mr. Glickstein with a subpoena before that grand jury—the minutes of which have only recently been obtained by the defendant as a result of the order of Judge Palmieri entered on June 15, 1978.

A reading of the minutes of Glickstein's appearance makes clear that prior to his appearance on September 14, 1966 (at which time he was repsesented by Mr. Gould), Mr. Glickstein and Mr. Gould met with the prosecutor in the latter's office. One of the matters discussed at that meeting was the attorney-client relationship that existed between Wolfson and Glickstein (see p. 3 of grand jury minutes annexed hereto as exhibit U). It was further discussed at said meeting according to the minutes (see p. 4) that if it became necessary for Glickstein to assert the privilege, the prosecutor might turn to the individuals (Wolfson and Gerbert) to see if a waiver could be obtained

from them. Moreover, it is clear from a reading of the minutes that Glickstein was himself a possible defendant with respect to an aspect of the grand jury investigation (see pp. 1, 2) and was confronted with the possibility of

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indictment for substantive violations of the Securities laws. Almost as an afterthought Mr. Armstrong further advised Mr. Glickstein that the grand jury "is also investigating possible obstruction of justice and perjury in connection with the SEC investigation into these matters" (see p. 3).

Despite his unique position as being counsel for Mr. Wolfson and being "called" before the grand jury that was to indict Mr. Wolfson, Mr. Glickstein failed to confer with his client prior to his decision to appear. Moreover, Mr. Gould, the lead counsel to Mr. Wolfson, represented Mr. Glickstein in his discussions with the prosecutor regarding Glickstein's grand jury appearance and the appearance itself without consulting with Mr. Wolfson. If Glickstein's appearance may be excused as an instance of faulty judgment, Gould's actions cannot be so excused. Clearly, Gould participated in the government's intimidation of Glickstein who was anything but a necessary witness. At best in representing Glickstein, Gould had to be aware of the conflict of interest. Moreover, there has never been an explanation as to why Gould did not see fit to consult Wolfson when Gould first became aware that Glickstein might appear before the grand jury. While Gould is able to document in detail discussions with Wolfson concerning Glickstein's appearance afterward, no such substantiation can be found prior to the appearance.

Irregardless of how Gould's actions are viewed, the

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cases clearly hold that the very appearance and testimony

of Glickstein before the grand jury was violative of Louis Wolfson's Sixth Amendment rights.

The leading decision in this area is that of Judge Frankel in *In re Terkeltoub*, 256 F.Supp. 683 (S.D.N.Y. 1966): Terkeltoub, an attorney, was retained to defend one Fiorillo against a federal perjury indictment. A month after indictment Terkeltoub was called before a grand jury and questioned concerning a meeting of himself, Fiorillo and a possible defense witness. Terkeltoub refused to testify and the government sought to compel.

In denying the application, Judge Frankel emphasized that "while the witness before us is a lawyer, the crucial interests at stake belong to the whole community" (256 F. Supp. at 684) and "that this sort of procedure must have at least a slightly chilling impact upon counsel for defendants in criminal cases" (256 F.Supp. at 685). Finally the Court concluded that compulsory grand jury inquiry of the kind sought in Terkeltoub invaded "the privacy and confidentiality of the lawyer's work in preparing the case," 265 F.Supp. at 685, and violates his client's Fifth and Sixth Amendment Rights electronic eavesdropping on defense councils. Id.

In the trial of Maurice Stans (and John Mitchell) the Court was afforded the opportunity to apply Terkeltoub in circumstances even more apposite to those in the instant matter. *United States* v. *Mitchell*, 372 F.Supp. 1239, 1244-

46 (S.D.N.Y. 1973). Three grand juries were investigating the transactions for which Stans was indicted. Stans was also involved in civil litigation concerning these transactions and had retained an attorney, Parkinson, to represent him in both matters. In April, 1974 Parkinson ceased

representation of Stans in connection with the grand jury, but continued on civil matters.

On May 4, 1973, in a private meeting, an Assistant United States Attorney obtained certain documents from Parkinson relating to Stans. On the same day Parkinson testified before one of the grand juries. Subsequently, the indictment was returned by a different grand jury.

Stans moved to dismiss the indictment, or in the alternative, to suppress the documents which Parkinson gave the government. Applying Terkeltoub, the Court held that Stans' Fifth and Sixth Amendment rights were invaded both by Parkinson's testimony before the grand jury and by his delivery of the documents, and it granted the motion to suppress. 372 F.Supp. at 1246.

The court declined to dismiss the indictment only because "[b]y an accident of fate, Parkinson's testimony never reached the ears of the indicting grand jury." Id.

The principal constitutional vice identified in *Terkeltoub* and its progeny [see, also *In re Grand Jury Proceedings,* 473 F.2d 840 (8th Cir. 1973), *United States* v. *Colacurcio,* 499 F.2d 1401 (9th Cir. 1974)* is the "chilling impact upon

counsel for defendants in criminal cases" which results from the mere fact of compelled grand jury appearance on matters relating to their clients' alleged wrongdoings. *In re Terkeltoub, supra,* 256 F.Supp. at 685. That vice was present in this case and is extant without regard to the substance of the testimony given by Glickstein.

In determining the issues here raised it must be recognized that Wolfson cannot be held accountable for the fail-

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* Glickstein's appearance was no less compulsory because he appeared under threat of subpoena instead of actual subpoena.

ure of his counsel to raise this issue at trial. The rights at issue are Wolfson's, not that of counsel. As the court recognized in the similar setting of *United States* v. *Mitchell, supra:*

> "The decision to 'volunteer' information of this nature rests with the client. Parkinson's erroneous conclusion that the information could not be withheld can in no way be imputed to Mr. Stans nor can the 'fruits' of that conclusion be used to the detriment of the defendant." 372 F.Supp. at 1246.

In any event, failure to raise fundamental constitutional error at trial is no bar to raising it in post-conviction proceedings. See e.g., *Kaufman* v. *United States,* 394 U.S. 217, 222 ff (1969).

From the foregoing it is readily discernible that Wolfson is entitled to a full evidentiary hearing, which would clarify areas that remain unresolved and would most likely reveal additional and aggravated violations of Wolfson's rights, especially in view of what is disclosed in Glickstein's grand jury testimony. The transcript shows Glickstein was a possible defendant and was so advised before the grand

jury in explicit terms—whn was Glickstein first so advised? What were the circumstances involved in the appearance of Glickstein, counsel for the defendant Wolfson, in the offices of the prosecutor prior to Glickstein's grand jury appearance? Why wasn't Wolfson informed of the meeting, let alone the grand jury appearance, by Gould? What were the circumstances involved in Glickstein's grand jury appearance without being subpoenaed but rather threatened with subpoena? How did Gould and Glickstein decide

to assert or waive the attorney-client privilege without first consulting with Wolfson?

The overriding consideration that mandates at the minimum, a full hearing is the deliberate intrusion by the Government into a constitutionally protected area of Sixth Amendment rights without even a showing of good faith basis.

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CONCLUSION

The Totality of Circumstances Involving Documented Instances of Prosecutorial Impropriety Has So Tainted the Conviction of Louis Wolfson That an Order Vacating the Judgment of Conviction Is Mandated or at the Minimum the Holding of an Evidentiary Hearing.

Respectfully submitted,

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Of Counsel

November, 1978

Opinion of the District Court Dated February 25, 1980

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Civ. 720 (LPG)

LOUIS E. WOLFSON,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM DECISION

GAGLIARDI, D.J.

Petitioner Louis Wolfson commenced this action seeking a writ of error *coram nobis* pursuant to 28 U.S.C. §1651, or alternatively an evidentiary hearing on the factual issues raised in the petition. Petitioner was convicted on September 28, 1967, after a jury trial before Hon. Edmund L. Palmieri and found guilty of violating the registration requirements of Section 5 of the Securities Act of 1933, 15 U.S.C. §77e ("Securities Act") in connection with the sale of stock of Continental Enterprises Inc. ("Continental"). *United States* v. *Wolfson*, No. 66 Cr. 720 (S.D.N.Y. September 28, 1967), *aff'd*, 405 F.2d 779 (2d Cir. 1968), *cert. denied*, 394 U.S. 946 (1969).

Since 1967, petitioner has persistently sought to set aside this judgment by a variety of post-conviction remedies. On October 10, 1968, petitioner moved for a new

trial on the ground of newly discovered evidence.[1] Judge Palmieri denied the motion. *United States* v. *Wolfson*, 297 F. Supp. 881 (S.D.N.Y. 1968), *aff'd*, 413 F.2d 804 (2d Cir. 1969). On May 16, 1975, having served his prison term and paid the fine imposed, petitioner filed his first petition for a writ of error *coram nobis*. The petition was denied by Judge Palmieri on both the merits and for petitioner's failure to follow the court's directions pursuant to Rule 41(b), Fed. R. Civ. P., *United States* v. *Wolfson*, No. 66 Cr. 720 (S.D.N.Y. July 26, 1976), *aff'd*, 558 F.2d 59 (2d Cir. 1977). In the instant petition, Wolfson alleges that newly discovered evidence, obtained under the Freedom of Information Act, as amended, 5 U.S.C. §552, and as a result of court orders, warrants the relief sought. For the reasons set forth below, the petition is denied.

I. *Statement of Facts*

Petitioner's conviction for violating Section 5 of the Securities Act required a finding that he acted knowingly. The government established this element of the offense in large part through the testimony of John J. Morley, Wolfson's stockbroker for over twenty years, and James Duncan, a former employee of the Securities and Exchange Commission ("S.E.C."). Duncan testified concerning a memorandum[2] that was prepared after Wolfson's appear-

[1] Petitioner challenged the authenticity of a memorandum introduced by the government at trial and labeled Government Exhibit 21. Judge Palmieri denied the motion after an extensive evidentiary hearing. Petitioner raises a new challenge to the government's use of the memorandum in the instant petition, as discussed *infra*.

[2] This is the same memorandum referred to in note 1, *supra*.

ance at the S.E.C. in 1950 in connection with an S.E.C. investigation of Capital Transit Company ("Capital"), a company that Wolfson controlled in the early 1950's. Since petitioner's present claims relate in part to the Capital investigation, the events surrounding that investigation must first be reviewed.

a. *Capital Investigation*

In 1949, Wolfson, members of his family and close associates purchased a controlling interest in Capital. During 1950, the market value of the stock increased substantially, triggering an S.E.C. investigation. The official S.E.C. order, dated September 20, 1950, directed an investigation into sales of Capital stock by certain named individuals who were believed to be members of the control group of Capital. The order identified petitioner as a member of the control group although it did not name him specifically as a target of the investigation. On October 12, 1950, petitioner and an associate made an appointment to speak with E. Russel Kelly, the Regional Administrator of the S.E.C. The meeting was also attended by Duncan, an assistant supervisor of the S.E.C. After the meeting, Kelly prepared an eight page memorandum "to the file," stating, *inter alia,* that petitioner and his associate had learned about the investigation, and that they were both concerned about rumors, potentially damaging to the company, that the stock was manipulated or the market rigged. According to the memorandum, the two hour conversion included a discussion of Section 5 registration requirements and definitions of "control persons." Although the Capital investigation uncovered violations of the Securities Act and the Securities Exchange Act of 1934, 15 U.S.C. §78a *et seq.*

("Exchange Act"), the S.E.C. decided to take no official action against any of the persons involved. The S.E.C.'s investigation also focused on the practices of the broker-dealers through whom the Wolfson group had sold their shares of Capital stock. Following its decision not to prosecute, the S.E.C. sent letters of censure to the broker-dealers involved, including A. M. Kidder and Co. ("Kidder"), requesting that they institute procedures to insure that there would be no future violations of Section 5.

b. *Continental and Merritt-Chapman Investigations and Trial*

In 1954, Continental was spun off from Capital, with Wolfson becoming its major shareholder. In 1962, Continental stock rose from $1 per share to $8 per share and thereafter dropped back to $1 per share. Prior to the decline, petitioner and an associate, Elkin B. Gerbert sold a substantial portion of their holdings. Between 1960-65, petitioner and members of his group were also trading in the stock of Merrit Chapman and Scott Corporation ("Merritt Chapman") in which they likewise held controlling interests. The S.E.C. commenced investigations into petitioner's activities in Continental and Merrit Chapman in 1965. Morley, a broker with Kidder and later with Reynolds and Co. ("Reynolds") after it acquired Kidder in 1963, was petitioner's principal stockbroker during this entire period. On October 18, 1965, in connection with the Merritt Chapman investigation, the S.E.C. examined Morley. Anthony Englese, in-house counsel for Reynolds, accompanied Morley and purported to represent him before the S.E.C. During the examination, which generated a 105 page transcript, Morley was questioned about his practices and those of his firms when trading in stock of Con-

tinental, Merrit Chapman and Capital. Inquiry was made into Morley's knowledge of the S.E.C. investigation of Capital trading in 1950-52. He was also asked whether or not he knew about a memorandum that Kidder circulated to its employees in 1950 setting forth the requirements for brokers' compliance with the Securities Act and demanding strict adherence to those requirements by Kidder employees.

On September 14, 1966, Joseph M. Glickstein, petitioner's attorney for many years, was scheduled to testify before the grand jury in relation to the Merritt Chapman investigation. In order to avoid encroaching upon matters within the scope of the attorney-client privilege, the Assistant United States Attorney met with Glickstein in the presence of Milton Gould, Esq., who represented Wolfson in the Continental case, to discuss any problems relating to privileged issues that might arise. Glickstein was assured that no attempt would be made to invade privileged areas and that the government was seeking Glickstein's testimony only in connection with his attendance at Merritt Chapman executive committee meetings. Gould accompanied Glickstein to the grand jury.

Petitioner and Gerbert were indicted on September 19, 1966 for violating Section 5 of the Securities Act in connection with their sales of Continental stock. They were both convicted on all counts. The government called Morley as a witness at the trial to testify regarding procedures he and his firm followed in handling transactions for petitioner and his associates. Morley stated that he and his firm were very conscientious about adhering to the Securities Act's restrictions on sales by control persons, that the firm rejected those sales that would violate the prohibitions and explained the restrictions to petitioner and his affili-

ates. Following Morley's direct examination, the government made available to petitioner's counsel the transcript of Morley's S.E.C. interview, as required by 18 U.S.C. §3500. The government requested, however, that pages which in its view did not relate to the subject of Morley's testimony at trial be excised. Judge Palmieri granted the government's request, and concurred in its determination of the pages to be deleted, with one exception: he ruled that the government turn over the page on which Morley stated that Englese was representing him. The deleted pages of Morley's testimony made reference to the 1950-52 Capital investigation and the Kidder memorandum. Petitioner's counsel cross-examined Morley extensively, pointing out inconsistencies in his testimony before the S.E.C. and at trial, as well as eliciting admissions of his noncompliance with the Securities Act. The prosecution questioned Wolfson about the meeting with Kelly in 1950. When Wolfson denied a recollection of the meeting, the government introduced as rebuttal evidence the memorandum prepared by Kelly. Duncan testified as to his recollection of the meeting after reading the memorandum which was also introduced into evidence.

Petitioner raised numerous claims of error on appeal from his conviction, including several relating to interpretation of the Securities Act sections which he and Gerbert were charged with violating. The Second Circuit considered and rejected these claims. In addition, petitioner objected to the prosecutor's summation to the jury. After discussing specific objections, the court stated, "without going into greater detail it will suffice to say that reading the prosecuting attorney's entire summation in conjunction with the court's charge discloses no reversible error." *United States* v. *Wolfson, supra,* 405 F.2d at 785. It ap-

pears that petitioner did not claim, as he was entitled to in accordance with 18 U.S.C. §3500(c), error in the district court's ruling that the government could withhold portions of Morley's S.E.C. testimony.

During the pendency of the appeal to the Second Circuit, Judge Palmieri denied petitioner's motion for a new trial based on a challenge to the authenticity of the Kelly memorandum. In connection with the motion, petitioner requested the S.E.C. files of the Capital investigation, labeled W525 and W557, from which the memorandum had been taken. Although Judge Palmieri denied this request, he ruled that petitioner was entitled to certain documents from these S.E.C. files. On appeal, petitioner claimed error in the district court's denial of his broader discovery motion. Rejecting petitioner's claims, the Second Circuit held that the district court did not err in denying petitioner access to the complete files covering investigations W525 and W557. *United States* v. *Wolfson, supra,* 413 F.2d at 808.

Following his conviction in the Continental case, petitioner was indicted and tried for Exchange Act violations in connection with the purchase and sale of Merritt Chapman securities.[3] In the course of that 1968 trial, petitioner gained access to the excised pages of Morley's S.E.C. testimony.

c. *First Coram Nobis Petition*

On May 16, 1975, petitioner filed his first *coram nobis* petition, seeking to set aside his conviction in the Conti-

[3] A divided Second Circuit reversed Wolfson's conviction in the Merritt Chapman case. *United States* v. *Wolfson,* 437 F.2d 862 (2d Cir. 1970). After two subsequent trials which resulted in hung juries, petitioner entered a plea of *nolo contendere* to one count and paid a fine imposed by the court.

nental case. The petition raised a myriad of claims, all of which Judge Palmieri entertained and rejected. Included were claims which reappear in the instant petition, albeit in a different guise. Petitioner argued, in his first *coram nobis* petition, as he had in the motion for a new trial and on appeal from the denial of that motion, that the prosecutor wrongfully withheld the S.E.C. files containing potentially exculpatory material. Petitioner once more asserted prosecutorial misconduct in the summation. Specifically, petitioner stated that the prosecutor knew that Wolfson had not been a defendant or prospective defendant in the Capital investigation and yet had deliberately misled the jury into believing that he had avoided prosecution and that the jury "should not let it happen again." (Petition at 34). Petitioner also raised a broad claim of ineffective assistance of counsel citing many specific instances; one particular grievance related to Glickstein's grand jury appearance, and counsels' failure to notify petitioner of the appearance in advance. A second grievance involved Gould, who petitioner claimed was the subject of a "criminal reference report" which recommended his prosecution for an unrelated matter. Petitioner further claimed that Morley's testimony at trial or before the S.E.C. was perjured, a fect which was known to the prosecutor. And finally, petitioner asserted that the prosecutor wrongfully excised material in violation of 18 U.S.C. §3500. Judge Palmieri denied petitioner relief on all claims. He rejected the claims of improperly withheld material as untimely, not having been raised on appeal in accordance with 13 U.S.C. §3500(c). *United States* v. *Wolfson, supra,* No. 66 Cr. 720 at 28. He ruled that the claim of Morley's perjury was insubstantial and further that it had previously been raised on appeal. *Id.* at 27. As to the claim of

improper summation, he stated that it, too, had been raised and rejected on appeal. *Id.* at 31.

The Second Circuit affirmed the denial of the coram nobis petition. *United States* v. *Wolfson, supra,* 558 F.2d 59. Although petitioner initially raised three issues on appeal, he subsequently abandoned the claim asserting error in the withholding of Morley's S.E.C. testimony, see *United States* v. *Wolfson, supra,* 558 F.2d at 64, n.18. The Second Circuit examined and rejected the claims involving Glickstein and Gould. With reference to the assertion that Gould was a subject of investigation, the court stated that the petition "presented little, aside from [petitioner's] own speculations, in support of the claim." *United States* v. *Wolfson, supra,* 558 F.2d at 65. The court devoted considerable discussion to the alleged impropriety of Glickstein's grand jury appearance prior to petitioner's indictment by the same grand jury. The court concluded:

> Wolfson's counsel claimed to have invoked the attorney-client privilege where appropriate and there is nothing to indicate that this is not so. And even if there were a violation of the attorney-client privilege, appellant concedes that he is unable to find any case in which such a violation has resulted in dismissal of an indictment or even in a new trial.

Id. at 66.

d. *Discovery Motions*

Petitioner next filed three motions in the district court on November 10, 1977, seeking, *inter alia,* a court order pursuant to Rule 6(e) of Fed. R. Crim. P. permitting disclosure of the minutes of Glickstein's grand jury testimony. Judge Palmieri stated that any claims relating to Glickstein's appearance should have been raised on appeal from

conviction. The court also stated that it had examined the minutes *in camera* and had concluded that the claim of improper representation would not be supported by anything which had occurred before the grand jury. In fact, the court stated "petitioner's rights were assiduously protected both by the Assistant United States Attorney and by the witness's invocation of the attorney-client privilege." *In re Wolfson,* M23-7/77 (S.D.N.Y. June 15, 1978) at 16. Nevertheless the court issued an order directing that the transcript be made available for copying by petitioner, stating that its decision was "primarily motivated by the desire to dispell the atmosphere, however groundless, of suspicion and accusation which ha[d] prevailed for too long in this litigation." *Id.* at 17.[4]

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[4] Judge Palmieri was the object of several recusal motions during the course of the thirteen years of Wolfson litigation in the courts of the Second Circuit and Southern District. See e.g. *United States* v. *Wolfson, supra,* 558 F.2d at 60-64; *United States* v. *Wolfson,* No. 66 Cr. 720 (S.D.N.Y. July 26, 1976); *Wolfson* v. *Palmieri,* 396 F.2d 121 (2d Cir. 1968); *Wolfson* v. *Palmieri,* 394 F.2d 7 (2d Cir. 1968). In affirming Judge Palmieri's denial of the first *coram nobis* petition, the Second Circuit, which had supported Judge Palmieri in his refusals to recuse himself, suggested that if there were any further proceedings in the Wolfson case that Judge Palmieri should consider voluntarily recusing himself. *United States* v. *Wolfson, supra,* 558 F.2d at 64, n. 17.

Judge Palmieri responded at length to the Second Circuit's suggestion in his opinion in *In re Wolfson,* No. M 23-7/77 (S.D. N.Y. June 15, 1978). Setting forth his reasons for denying the motion for recusal which was again then before him, Judge Palmieri stated:

> Petitioner's exhaustive post-conviction efforts have caused a considerable expenditure of judicial resources, to say nothing of the time and expense inflicted upon the United States Attorney and related agencies. He has left in his wake massive and complex records which would impose a heavy burden on any judge of this court assigned to the case. All of the Assistant United States Attorneys familiar with these proceedings have resigned and the Court understands that this

II. *Discussion*

With the foregoing as background, this court now examines the claims before it. Wolfson argues that he has discovered new facts through recently obtained evidence heretofore unavailable to him, which would have resulted in his acquittal had the facts been known during the Continental trial.

The "critical" newly discovered evidence is as follows: (1) S.E.C. documents and files relating to the Capital and

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is largely true with respect to the personnel of the Securities and Exchange Commission. The efficient administration of justice would have been frustrated by a decision to disqualify.

Id. at 8. Nevertheless, Judge Palmieri went on to state:

> [A]fter ruling on the motions presently *sub judice* and filing this opinion, this Court will address the Assignment Committee . . . and request that any further responsibility for these proceedings be assigned to another judge of this Court.

Id. at 10.

The instant petition was then assigned to this court. Although viewing the claims before it dispassionately, this court cannot fail to be aware of the history of the case, if only because the court has been required to locate, assemble, and review extensive records in order to analyze the repetitive claims that have been presented. Were this a habeas petition, the court would have recourse to a provision in 28 U.S.C. §2254 (and 28 U.S.C. §2255), which reads:

> (b) Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Rules Governing §2254 Cases, Rule 9. The court is not aware of an analogous provision in 28 U.S.C. §1651 authorizing the dismissal of a petition which the court considers to be an abuse of the writ of error coram nobis. For this reason, and also in order to present as full a record as possible, the court has considered every issue raised by petitioner.

Merritt investigations; (2) the memorandum prepared by Kidder at the time of the Capital investigation; (3) the deposition of Anthony Englese. who represented Morley at his appearance before the S.E.C. in 1965; and (4) the transcript of Glickstein's testimony before the grand jury.

Petitioner states that the S.E.C. files revealed that Kidder and Morley were subjects of the 1950 investigation, and even more relevant, that he was not. Therefore, access to the files, according to Wolfson, would have enabled him to refute the prosecutor's improper innuendos linking him to the 1950 Capital investigation which misled the jury into believing that petitioner had been guilty of the same Section 5 violations in 1950. Petitioner alleges that the Kidder memorandum reveals that Kidder had been the subject of investigation by the S.E.C. in 1950, and that in addition, it is evidence of Morley's knowledge and subsequent blatant disregard of the Securities Act's requirements. The Englese deposition demonstrated that Englese misled the S.E.C. when he accompanied Morley in 1965 into believing that he was Morley's counsel rather than in-house counsel for Reynolds. Englese's deposition also revealed that he had accompanied Morley to the office of the Assistant United States Attorney who prosecuted the Continental case. From these facts, petitioner argues that the government and Reynolds entered into a deal trading Morley's testimony for Reynolds' immunity from prosecution for its own Securities Act violations. And finally, petitioner states that Glickstein's grand jury transcript supports the previously raised claim of ineffective assistance of counsel. In sum, petitioner asserts, citing *Brady* v. *Maryland*, 373 U.S. 83 (1963), that his Fifth Amendment due process rights were violated as a result of the prosecutor's "fraudulent representations to the trial court [which]

deceived Judge Palmieri into excising critical pages of the testimony before the S.E.C. in 1965 by John Morley, a key prosecution witness." In addition to this Fifth Amendment claim, petitioner asserts a Sixth Amendment violation as a result of Glickstein's grand jury appearance. These claims will be considered *in seriatim* after a review of the applicable standards for reviewing a petition for a writ of error *coram nobis*.

A writ of error *coram nobis* is an extraordinary remedy that is invoked to vacate a judgment of conviction only where there has been a fundamental error of fact rendering the proceedings irregular and invalid. *United States* v. *Morgan*, 346 U.S. 502 (1954); *United States* v. *Mayer*, 235 U.S. 55 (1914); *United States* v. *Keogh*, 417 F.2d 885 (2d Cir. 1969); *United States* v. *Keogh*, 391 F.2d 138 (2d Cir. 1968). The purpose of the writ is "to bring to the attention of the court some fact unknown to the court, which if known would have resulted in a different judgment." *Allen* v. *United States*, 162 F.2d 193, 194 (6th Cir. 1974). The factual matters to be reviewed must be of the utmost gravity. *United States* v. *Malinsky*, 310 F. Supp. 523 (S.D.N.Y. 1970). Equally well settled is the principle that the petitioner is entitled to an evidentiary hearing only if he raises a material issue of fact on a claim of constitutional dimensions. *United States* v. *Carlino*, 400 F.2d 56 (2d Cir. 1968), *cert. denied*, 394 U.S. 1013; *United States* v. *Tribote*, 297 F.2d 598 (2d Cir. 1961).

This court must also be mindful of proscriptions against repetitive litigation. Issues that have been adjudicated upon trial or appeal may not be raised in a collateral attack. See *Murgia* v. *United States*, 448 F.2d 1275, 1276 (9th Cir. 1971); *Stein* v. *United States*, 390 F.2d 625 (9th Cir. 1968). "It is hornbook law by now that a Section 2255

motion [the modern equivalent to *coram nobis*] may not be used to relitigate matters not only decided, but which could have been presented, on direct appeal, nor may the section be applied in a collateral attack based upon a fragmentized claim which petitioner raised in a slightly different fashion at his trial and upon appeal." *Williams* v. *United States,* 334 F. Supp. 669, 671 (S.D.N.Y. 1971), *aff'd,* 463 F.2d 1183 (2d Cir. 1972), *cert. denied,* 409 U.S. 967 (1972) (citations omitted). See *Polizzi* v. *United States,* 550 F.2d 1133 (9th Cir. 1976).

A. *Fifth Amendment Brady Claim*

Petitioner argues that the government violated the dictates of *Brady* v. *Maryland,* 373 U.S. 83 (1963) by deliberately suppressing portions of Morley's S.E.C. testimony. That testimony, petitioner contends, in conjunction with the Kidder memorandum, would have enabled the defense to convince the jury that Morley had willfully violated the Securities Act, thus placing the credibility of the government's key witness in question. The result, according to petitioner, would have been a reasonable doubt of petitioner's guilt in the jury's mind sufficient to obtain an acquittal. Although petitioner asserts that the excised pages led to the suppression of other relevant and exculpatory material, such as the Kidder memorandum and the S.E.C. investigative file, the claim, stripped to its bare essentials, is simply one of violation of 18 U.S.C. § 3500.[5]

[5] In *Brady* v. *Maryland,* 373 U.S. 83 (1973), the court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. In *United States* v. *Keogh,* 391 F.2d 138 (2d Cir. 1968), the Second Circuit ap-

As such, this court is barred from addressing the merits of this claim on several grounds. First, the trial court, at defense counsel's request, examined the excised portions *in camera* and preserved the transcript for review by the Court of Appeals, in accordance with 18 U.S.C. § 3500(c). However, petitioner failed to raise the propriety of the court's ruling on appeal. Furthermore, petitioner's claim that Morley's suppressed testimony would have enabled him to impeach Morley's credibility was asserted in his first petition for a writ of error *coram nobis*. Judge Palmieri rejected the claim because petitioner had an oppor-

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plied the rule to a *coram nobis* petition. The court first reviewed guidelines for a habeas attack on a conviction when the defense has discovered after trial that a prosecutor withheld exculpatory material from a defendant at trial. The court distinguished three categories of cases and the requisite showing of materiality required by petitioner in each category to entitle him to post-conviction relief: (1) when the prosecutor deliberately withholds evidence which he knows would be of great value to the defendant, the evidence is, by definition, of such great importance that there is no question that the defendant was prejudiced, *id.* at 146-47; (2) when the prosecutor suppresses evidence favorable to the accused after his request, the evidence must be material to guilt or punishment regardless of the good or bad faith of the prosecutor, *id.* at 147, *citing Brady* v. *Maryland, supra;* and (3) when the prosecutor inadvertently suppresses material which it later appears the defendant could have used, there must be a high showing of materiality, *United States* v. *Keogh, supra,* 391 F. 2d 147. The court held that a *coram nobis* petition required a high showing of materiality to entitle the petitioner to post-conviction relief, *id.* at 147, and further stated, "it is only when the court concludes that the undisclosed evidence would have permitted the defendant so to present his case that he would probably have raised a reasonable doubt as to his guilt in the mind of a conscientious juror that justice compels the invalidation of the conviction." *Id.* at 148. See also, *United States* v. *Keogh,* 440 F. 2d 737, 741 (2d Cir. 1971). As the ensuing discussion reveals, this court does not find that the allegedly withheld evidence would have been of any benefit to petitioner at trial, much less that it would have raised a reasonable doubt as to his guilt.

tunity to remedy any error on appeal from his conviction. Notwithstanding this deficiency, the trial court considered the merits of the claim labeling "petitioner's excursion into the area of the 3500 material . . . a hollow issue," *United States* v. *Wolfson*, No. 66 Cr. 720 (S.D.N.Y. July 26, 1976) at 28, Judge Palmieri continued:

> The main thrust of this claim, as petitioner admits, relates to the "relative 'guilt' of Wolfson, the defendant, versus Morley, the prosecution witness." This is a contention that was unsuccessfully presented at trial. Petitioner appears unable or unwilling to grasp the fact that Morley's knowledge cannot exculpate the petitioner. The evidence and testimony objected to was presented to demonstrate that petitioner was aware of the registration requirements. Evidence that shows Morley to have had the same awareness proves nothing.

Id. at 29. Petitioner did not pursue this claim on appeal from the denial of the petition. *See* 558 F.2d at 64, p. 18. Despite the fact that the claim of improper redaction of 3500 material was not raised at the appropriate time, it was nonetheless considered and rejected on the merits by Judge Palmieri. Under any standard of *coram nobis* review, this court may not consider it again. *Williams* v. *United States, supra*, 334 F. Supp. at 671.

Petitioner would fare no better if this court were to consider the merits of the claims relative to the allegedly suppressed material. The Kidder memorandum is a six page review of the Securities Act requirements, prepared by Kidder in 1950, in conjunction with the S.E.C. for distribution to its personnel involved in the sale of securities.

This court cannot conceive of any possible theory under which petitioner's possession of that document at trial would have caused a different result. Petitioner argues that the memorandum would have been evidence that Morley knew of and later defied the Securities Act requirements, and also that the S.E.C. had investigated Kidder. Morley's knowledge is not contradictory to his position at trial; in fact he testified that he conveyed this knowledge to petitioner. And, too, Morley admitted before the S.E.C., which admissions were included in the redacted version of his testimony in court, that he had violated the Act and had been censured by his firm. Furthermore even if Morley and Kidder *had* violated the Securities Act in 1950, that fact could not have so discredited Morley in 1967 so as to have affected the outcome of the trial. And finally, Morley's credibility had been attacked at trial by the demonstration of inconsistencies between his S.E.C. and trial testimony. This renewed attack on Morley's credibility, raised through this "newly discovered evidence", entitles petitioner neither to an evidentiary hearing, *see United States* v. *Tribote,* 297 F.2d 598, 600 (2d Cir. 1961) nor to a writ of error *coram nobis* vacating his conviction. *United States* v. *Keogh,* 391 F.2d 138, 148 (2d Cir. 1968).

Petitioner also asserts that the previously withheld S.E.C. files of the Capital investigation, which contained the Kidder and Kelly memoranda are important "newly discovered evidence" because they allegedly support the claim that the prosecutor deliberately misled the jury during the summation. A similar argument was raised and rejected in the first *coram nobis* petition on the ground that even at that point in the proceedings it had been previously considered. *See* petition for a Writ of Error Coram Nobis, May 16, 1975 at 34-35; *United States* v.

Wolfson, No. 66 Cr. 720 (S.D.N.Y. July 26, 1976) at 31. Nothing in the files adds weight to the argument, which is revealed on close examination to be not only implausible but disingenuous. Had all the facts surrounding the Capital investigation been known, according to petitioner, the jury would have believed him when he said he didn't remember anything about the meeting with Kelly. After all, why would he be expected to remember a meeting of so little consequence to him. The argument is flawed because, in the first instance, the prosecutor's statement did not create the "totally false impression" that Wolfson was the target of an investigation in 1950. The challenged portion of the summation reads:

> [T]here is an additional significance to this document [Exhibit 21], and that is that Mr. Wolfson did take the stand, . . . and he sat there and he tried—he had the nerve to try to put over on this jury the idea that he was as innocent today as he pretended to be on (October 12, 1960).[6]

(Trial transcript at 2453). According to the Kelly memorandum, Wolfson told Kelly at the meeting that he knew nothing about the Securities Act and the registration requirements. The prosecutor's statement fairly describes Wolfson's professed lack of knowledge. And, although not named as a target of the investigation the S.E.C. files describe the nature of Wolfson's interest in the company being investigated. The jury would have expected Wolfson to remember a two hour meeting with an S.E.C. official that was precipitated by an investigation into the company

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[6] The transcript erroneously states August 12, 1950; however, the meeting was on October 12.

which he controlled. This court concludes that nothing in the S.E.C. files would have changed the jury's assessment of Wolfson's credibility with respect to the Kelly meeting, nor his culpability in the Continental case.

Petitioner claims that the Englese deposition is probative of the deal between Morley, Reynolds and the government. However, petitioner does not support this accusation by specific reference to any statement of Englese, nor is this court able to discern the existence of such a deal by its reading of the deposition testimony. The court concludes that the allegations are pure speculation, and as such cannot entitle petitioner to any relief. *Accardi* v. *United States*, 379 F.2d 312, 313 (2d Cir. 1967); *United States* v. *Tribote, supra*, 297 F.2d at 601.

B. Sixth Amendment Ineffective Assistance of Counsel Claim

a. *Glickstein*

In reviewing the denial of the first *coram nobis* petition, the Second Circuit carefully considered and rejected petitioner's claim that Glickstein's grand jury appearance denied Wolfson his Sixth Amendment rights. The court noted that "Wolfson's counsel claimed to have 'invoked the attorney-client privilege where appropriate,' and there is nothing to indicate that this is not so." *United States* v. *Wolfson, supra*, 558 F.2d at 66. The court held that the claim "had insufficient factual support of likelihood of ultimate success." *Id.* Upon petitioner's 1977 post-trial motion, Judge Palmieri reviewed the transcript and concluded that there had been no violation of the attorney-client privilege but, nevertheless, granted petitioner's motion. On the basis of having seen the transcript, petitioner

now renews this claim. This court has also reviewed the transcript, and agrees with Judge Palmieri that it reveals that Glickstein conscientiously and carefully protected any privileged information from disclosure. The court therefore finds that the claim is baseless.

b. *Gould*

Petitioner again raises the spectre of a secret deal between the S.E.C. and Gould to overturn a twelve year old conviction. The claim has been previously considered and rejected; in the first coram nobis petition and on appeal from that decision. It is therefore inappropriate for this court's review. The merit of the claim is further diminished by Gould's sworn statement of April 10, 1978, in which he asserts that he has no knowledge that he was ever a target of an S.E.C. investigation in the matter alleged or any other matter. (Government's exhibit B).

III. *Conclusion*

Petitioner has again attacked his conviction by attempting to undermine the evidence introduced against him at his trial. He states "[w]hat a difference at the trial if Morley's credibility could have been destroyed and the memo introduced through Duncan refuted! ! !" (Petition at 6). Although this court neither heard the testimony nor viewed the exhibits as they were introduced, it has reviewed substantial portions of the trial record as they relate to the issues before it. The court need not speculate as to whether either of the conditions hypothesized by petitioner would have indeed led to a different result because the court cannot agree with petitioner that he has uncovered facts which would have led unalterably to the destruction of Morley's

credibility or to the discrediting of the S.E.C. memorandum. Accordingly, the petition is denied.

So Ordered.

/s/ LEE P. GAGLIARDI
Lee P. Gagliardi
U.S.D.J.

Dated: New York, New York
February 25, 1980

Judgment of the District Court Dated February 28, 1980

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Crim. 720 (LPs.)

LOUIS W. WOLFSON,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

JUDGMENT

The above named petitioner having filed a petition for a Writ of Habeas Corpus, pursuant to Title 28 U.S.C. Sec. 2255 and said petition having been submitted to the Honorable Lee P. Gagliardi, United States District Judge, and the Court thereafter on February 25, 1980, having handed down its decision denying the said petition, it is,

ORDERED, ADJUDGED AND DECREED: That the petition be and it is hereby denied in all respects. Petition *corum nobis* denied.

Dated: New York, N.Y.
February 28, 1980

/s/ RAYMOND F. BURGHARDT
Clerk

U. S. DISTRICT COURT
S.D. OF N.Y.
FEB 18 1980

Opinion of the Court of Appeals Delivered From the Bench on July 25, 1980

"Judge Palmieri's bias and the Prosecutor's misconduct have already been rejected by this Court. They are again rejected. This Court finds the attack upon Judge Gagliardi without foundation. We find Judge Gagliardi's opinion to be fair and well reasoned and sound. We affirm substantially for the reasons set forth in that opinion."

Judgment of the Court of Appeals Dated July 25, 1980

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of July one thousand nine hundred and eighty.

Present:

HON. ELLSWORTH A. VAN GRAAFEILAND, C.J.
HON. JON O. NEWMAN, C.J.
HON. EDWARD R. NEAHER, D.J.

Circuit Judges,

LOUIS E. WOLFSON,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the Court's oral opinion in court with costs to be taxed against the appellants.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
JUL 25 1980
A. DANIEL FUSARO, CLERK

Order of the Court of Appeals Denying Petition for Rehearing Dated September 18, 1980

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
80-2078

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 18th day of September, one thousand nine hundred and eighty.

LOUIS E. WOLFSON,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the petitioner-appellant Louis E. Wolfson, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ WILFRED FEINBERG
Chief Judge

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
SEP 18, 1980